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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

LEXECON INC., *et al.*,
Petitioners,
v.
MILBERG WEISS BERSHAD HYNES & LERACH, A PARTNERSHIP, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

MICHAEL W. MCCONNELL
STEPHEN M. SHAPIRO
MICHELE L. ODORIZZI
MAYER, BROWN & PLATT
190 S. LaSalle Street
Chicago, IL 60603
(312) 701-7201

KENNETH S. GELLER
MAYER, BROWN & PLATT
2000 Pennsylvania Ave., N.W.
Suite 6500
Washington, D.C. 20006
(202) 463-2000

MICHAEL K. KELLOGG
Counsel of Record
MARK C. HANSEN
JEFFREY A. LAMKEN
AUSTIN C. SCHLICK
SEAN A. LEV
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900

Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED

1. Whether a district court, to which a case has been transferred solely for "consolidated pretrial proceedings" under the federal multidistrict litigation statute, 28 U.S.C. § 1407(a), may transfer the case to itself for purposes of trial, notwithstanding section 1407(a)'s explicit command that every such case "shall be remanded" at the conclusion of pretrial proceedings "to the district from which it was transferred."

2. Whether, in ruling on a motion to dismiss, a district court may go outside the four corners of the complaint and rely on its own analysis of public record materials to decide disputed questions of fact.

PARTIES TO THE PROCEEDING BELOW

The following persons or entities were parties to the proceeding in the court of appeals:

Lexecon Inc.
Daniel R. Fischel
Milberg Weiss Bershad Hynes & Lerach
Cotchett, Illston & Pitre
Patrick Coughlin
William S. Lerach
Kevin P. Roddy
Leonard B. Simon
Melvyn I. Weiss
Patricia Hynes
Michael C. Spencer
Stephen R. Steinberg
Joseph Cotchett
Susan Illston

PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

Lexecon Inc. is a privately held corporation that has no parent companies or subsidiaries that have issued shares to the public.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Lexecon Inc. and Daniel R. Fischel petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-52a) is reported at 102 F.3d 1524. The district court's opinion granting summary judgment in part (Pet. App. 64a-79a) is reported at 884 F. Supp. 1388; the court's opinion granting defendants' motion to dismiss in part (Pet. App. 80a-99a) is reported at 845 F. Supp. 1377.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The federal multidistrict litigation statute states in pertinent part:

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however,* That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

28 U.S.C. § 1407(a).

The federal transfer statute provides in relevant part:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. § 1404(a).

STATEMENT OF THE CASE

Citing policy concerns, the Ninth Circuit has endorsed a widespread district court practice that is directly contrary to the relevant statutes and that undermines plaintiffs' historical right to their choice of forum for litigation.

In enacting the multidistrict litigation statute, 28 U.S.C. § 1407, Congress authorized the Judicial Panel on Multidistrict Litigation ("JPML") to transfer cases only for

purposes of "coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a). Congress specified that all such cases must be remanded as soon as those proceedings are complete: "Each action so transferred *shall be* remanded by the [JPML] at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated." *Id.* (emphasis added).

Despite this unequivocal statutory directive, district courts assigned to oversee coordinated pretrial proceedings have "routine[ly]" decided to retain those cases for all purposes, including trial. Pet. App. 31a (Kozinski, J., dissenting). Citing 28 U.S.C. § 1404(a), they have "transferred" these cases to *themselves,* preventing the cases from ever returning to their home district, as Congress intended. Section 1404(a) provides no support for this practice. By its terms, it authorizes transfer only "to any *other* district or division where it might have been brought" (emphasis added). It does not authorize a district court to transfer a case to itself.

Nonetheless, through repeated use of this "self-transfer" mechanism, the district courts have, in Judge Kozinski's words, "parlayed a narrow grant of authority to conduct consolidated discovery into a mechanism for systematically denying plaintiffs the right to trial in their forum of choice." Pet. App. 30a (Kozinski, J., dissenting). And they have accomplished this "remarkable power grab" (*id.*) without any protest from the courts of appeals, which have cited pragmatic considerations based on efficiency as a sufficient basis for self-transfer. In fact, the practice has been sanctioned by the JPML itself. The JPML's rules—which (unlike the Federal Rules of Civil Procedure) are not reviewed by this Court prior to becoming effective—expressly state that cases need not be remanded for trial where they have been "ordered transferred by the transferee judge to the transferee or other district." JPML Rule 14(b).

Such concerted disregard of a clear congressional mandate cries out for correction. Review by this Court is

necessary to align federal court practice with the plain language of sections 1404 and 1407 and to restore plaintiffs' traditional prerogative in choosing the forum for trial.

The Ninth Circuit's decision also presents a second issue of importance to the administration of justice. It is a fundamental premise of the Federal Rules of Civil Procedure that plaintiffs must have an opportunity to conduct discovery and substantiate their allegations before their claims may be dismissed for a failure of proof. In deciding a motion to dismiss under Rule 12(b)(6), therefore, a court must assume the truth of all the allegations in plaintiff's complaint. In this case, the Ninth Circuit rejected that bedrock rule as an outdated "formalism." Pet. App. 23a. The majority held that courts may go outside the four corners of the complaint and rely on public record materials—including, in this instance, the unsworn statements of a recused judge—to decide disputed questions of fact at the motion to dismiss stage. That understanding of the appropriate use of public records undermines the important role of Rule 12(b)(6) and directly conflicts with the law of other circuits.

A. Background and Prior Proceedings

1. Lexecon is one of the nation's leading law and economics consulting firms. Daniel Fischel is a principal of Lexecon and the Freeman Professor of Law and Business at the University of Chicago Law School. Professor Fischel frequently testifies as an expert in complex class action securities cases.

The respondents—two law firms [1] and certain individual members of those firms—are plaintiffs' class action lawyers. They have, in recent years, brought numerous, highly-publicized class action securities lawsuits. Professor Fischel provided what was characterized by many commentators—such as the Wall Street Journal—as decisive

[1] The two law firm defendants are Milberg Weiss Bershad Hynes & Lerach and Cotchett, Illston & Petrie.

testimony for the defense in a number of those suits, thereby costing defendants millions of dollars in contingency fees.

In 1992, Lexecon and Professor Fischel (jointly "Lexecon") filed this diversity action in the Northern District of Illinois, their home district, alleging that respondents—angered by this succession of costly losses—engaged in a wide-ranging effort to ruin Lexecon's reputation and put it out of business. The first step in respondents' scheme was to name Lexecon as a defendant in *Shields v. Keating*, a case heard in the District of Arizona as part of MDL No. 834, *American Continental Corporation/Lincoln Savings & Loan Litigation*. Respondents, who were class counsel in that case, falsely accused Lexecon of complicity with Charles Keating in one of the most notorious savings and loan scandals of this century. Respondents then used their *Lincoln Savings* complaint against Lexecon in courtrooms around the country, in the press, and with Lexecon's clients and business associates to portray Professor Fischel as a "crook" and a "racketeer" and Lexecon as a firm whose expert credentials could no longer be trusted. As a result, Lexecon lost millions of dollars in fees, and both petitioners suffered significant damage to their reputations.

2. In this suit, Lexecon seeks damages for respondents' malicious prosecution of the *Lincoln Savings* case, abuse of process, tortious interference with petitioners' existing and prospective client relationships, defamation, and commercial disparagement.

Initial pretrial matters in this case were handled by Judge Zagel in the Northern District of Illinois. Those proceedings did not go well for respondents. The district court rejected their personal jurisdiction arguments and indicated that it did not agree with some of their key legal contentions.

After six months of pretrial proceedings before Judge Zagel, respondents filed a motion with the JPML pursuant to 28 U.S.C. § 1407 to have this case transferred to the

District of Arizona and consolidated with the *Lincoln Savings* litigation that gave rise to some of Lexecon's claims. Before the JPML could rule on defendants' transfer motion, Judge Bilby, the presiding judge in the *Lincoln Savings* case, sent a letter to the JPML recusing himself from the *Lexecon* case because his "involvement" in the resolution of the underlying case would make it "improper" for him to act as a judge in the *Lexecon* case.

Notwithstanding Judge Bilby's recusal, respondents renewed their motion to transfer, asking the JPML to send the *Lexecon* case to any other judge in Arizona. Over Lexecon's objections, the JPML granted respondents' motion to transfer on the ground that there was an extensive document depository in Arizona and that there might be some opportunity for coordination with a still unfinished settlement involving one of the defendants in *Lincoln Savings*. Pet. App. 100a-102a. Once transferred to the District of Arizona, the case was assigned to Judge Roll, who had no previous familiarity with this matter or with any of the *Lincoln Savings* cases.

3. No coordinated proceedings ever ensued. The transfer did, however, have a significant impact on the course of the litigation. In particular, the district court, relying on its own "independent" evaluation of the merits of the *Lincoln Savings* suit against Lexecon—and not accepting the truth of the allegations contained in Lexecon's complaint—granted respondents' motion to dismiss as to the malicious prosecution and abuse of process claims. Pet. App. 85a-92a.

After this case had been in Arizona for a year, it had become abundantly clear that there would never be any "coordinated or consolidated" pretrial proceedings. Indeed, all other proceedings in MDL No. 834 had long since been concluded, and the only other factor cited by the JPML in ordering transfer—the presence of a "document depository" in Arizona—did not even exist any more. The documents that had been produced in this case—over a million pages worth—were being kept in

Illinois, and only one of the 42 deponents or potential deponents resided in Arizona. Thus, in accord with the procedures specified by the JPML (*see* JPML Rule 14(d)), Lexecon moved the Arizona district court to remand the case back to the Northern District of Illinois, where it had been filed. The district court deferred decision on that motion until the end of discovery, at which time Lexecon renewed its request to return the case to Illinois.

Respondents objected to the remand motion and filed their own motion to transfer the case permanently to Arizona. They also moved for summary judgment on all remaining issues. Without ruling on Lexecon's remand motion, the court granted summary judgment to respondents on all remaining issues, except for one aspect of Lexecon's defamation claim. Pet. App. 64a-77a.

Soon thereafter, the Arizona district court denied Lexecon's motion to remand and simultaneously granted respondents' request that it transfer the case permanently to itself. Pet. App. 61a-62a. Without mentioning the language of 28 U.S.C. § 1407, the court stated that there was "[s]ubstantial authority"—including JPML Rule 14(b)—establishing that section 1407 does not require a case to return to its original district after coordinated pretrial proceedings are complete. Pet. App. 61a. The court further concluded, again without mention of the relevant statutory language, that 28 U.S.C. § 1404 gave it the "power to transfer this action to itself." Pet. App. 61a.

4. Lexecon believed that the district court's actions in transferring this case to itself violated sections 1404 and 1407 and subjected the company to potentially irreparable harm—requiring it to go to trial in a forum thousands of miles from home where "there was much popular feeling" against companies that, like Lexecon, were alleged to have been involved in the Charles Keating/Lincoln Savings scandal. Pet. App. 47a (Kozinski, J., dissenting). Lexecon thus petitioned the Ninth Circuit for a writ of mandamus.

The Ninth Circuit held oral argument on the mandamus petition, but eventually determined that extraordinary relief was not warranted in this instance. Pet. App. 55a-60a. The two-judge majority did note, however, that Lexecon's legal position had considerable force. The majority explained that section 1407 provided an apparently "clear statutory mandate" and that the court "might well" decide on direct review that the district court's self-transfer decision was unlawful. Pet. App. 58a.

Judge Kozinski dissented from the refusal to issue a writ. He would have granted the petition to correct the district court's "egregious, oft-repeated error" in "disregard[ing] the statutory mandate" of sections 1404 and 1407. Pet. App. 58a, 59a (Kozinski, J., dissenting). Section 1407, in his view, represented an "important policy choice"—allowing limited transfers, but retaining plaintiffs' "ancient right" to select a forum for trial—that "federal judges are bound to respect." Pet. App. 60a; *see* 15 Wright, Miller & Cooper, *Federal Practice & Procedure* § 3867, at 111 (Supp. 1996) (discussing Judge Kozinski's mandamus dissent).

5. The trial on the defamation claim—a claim that was governed by Illinois law—then went forward in the District of Arizona. The respondents prevailed in a jury trial, and the district court entered final judgment.

B. The Decision Below

On appeal from that judgment, a different and sharply divided panel of the Ninth Circuit affirmed the district court's rulings in all respects. Judge Kozinski was the only member of this panel who had also ruled on the mandamus petition.

1. The majority, relying on "longstanding practice and the efficiency arguments" in favor of self-transfer (Pet. App. 14a), found no flaw in the district court's decision to transfer this case to itself. Such transfers, the majority stated, are authorized both by the JPML's rules and by a

long series of court of appeals and district court decisions. Pet. App. 12a & n.3 (collecting cases). The majority further concluded that, in the multidistrict litigation context, the judicial interest in "efficien[t]" disposition of cases "trump[s]" the "usual deference to a plaintiff's choice of forum." Pet. App. 13a & n.5. Finally, the majority suggested that section 1407 is concerned only with the powers of the JPML and thus does not disturb the "traditional powers of the district court to which a case has been transferred." Pet. App. 15a.

The majority also affirmed the district court's dismissal of Lexecon's malicious prosecution and abuse of process claims. It rejected as "absurdly formal" the requirement that a district court confine its review at the motion to dismiss stage to the allegations in Lexecon's complaint. Pet. App. 23a. Rather, in the majority's view, it was appropriate for the district court to consider the "public record" in resolving disputed factual questions at that stage. *Id.* Applying that logic here, the majority held that Lexecon's claims failed because, notwithstanding the allegations in Lexecon's complaint, the record in *Lincoln Savings* showed as a matter of fact that (1) *Lincoln Savings* did not result in a "termination" favorable to Lexecon and (2) naming Lexecon as a defendant in the *Lincoln Savings* suit did not have as its "*primary purpose* to inflict harm" on the company. Pet. App. 24a, 28a.

2. Judge Kozinski again dissented. Adding flesh to his earlier opinion, he stressed once more that self-transfer is a remarkably common, but thoroughly improper, practice. This practice, he emphasized, conflicts both with the plain terms of section 1407 and with Congress's explicit intent *not* to authorize section 1407 transferee courts to conduct trials. Pet. App. 30a-31a (Kozinski, J., dissenting). Nor could the district court's course of action be reconciled with section 1404(a), whose text states "in plain and simple terms" that a case may be transferred only to " 'any *other* district or division where

it might have been brought.'" Pet. App. 41a (Kozinski, J., dissenting) (quoting section 1404(a)). By upholding the practice of self-transfer in the face of such clear statutory language and legislative history, the majority had "complete[d] the judicial arrogation of power in this area and put the last coffin nail into the experiment Congress started in 1968 when it gave the federal courts only a limited MDL authority." Pet. App. 52a (Kozinski, J., dissenting).

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S DECISION RATIFIES AN ENTRENCHED FEDERAL COURT PRACTICE THAT IS DIRECTLY CONTRARY TO THE PLAIN LANGUAGE OF THE RELEVANT STATUTES AND THAT UNDERMINES CONGRESS'S EXPRESS INTENT TO PRESERVE PLAINTIFFS' CHOICE OF FORUM

The lower federal courts have illegitimately converted the multidistrict litigation statute into a mechanism for shuttling entire cases off to far-flung districts for trial in forums that plaintiffs would never have chosen. Although over 92,000 cases have been transferred in the past three decades under section 1407, only 3,500—less than four percent—have ever returned to their home district. *See* Pet. App. 30a (Kozinski, J., dissenting) (citing Administrative Office of United States Courts, *Judicial Business of the United States Courts: 1995 Report of the Director* 32). The stark reality is that "once a case is sucked into the MDL vortex, it seldom comes back." Pet. App. 45a (Kozinski, J., dissenting).

To be sure, some cases have not returned to their home districts because they settled or were dismissed while consolidated pretrial proceedings were still underway. Many others, however, have not returned because the district court assigned to oversee pretrial proceedings decided to retain the case for all purposes, including

trial. As Judge Kozinski explained, federal judges have "develop[ed] proprietary feelings toward the cases entrusted to them" and have "routine[ly]" refused to relinquish them at the end of pretrial proceedings. Pet. App. 31a. Thus, in the multidistrict litigation context, plaintiff's choice of forum—which, under traditional principles, "should rarely be disturbed" (*Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947))—has "devolved to the significance of a tailbone or an appendix." Pet. App. 44a (Kozinski, J., dissenting).

This practice of "self-transfer" cannot be reconciled with the language of either section 1407 or section 1404. It is directly contrary to all evidence of Congressional intent and to the historical rights of plaintiffs to choose their forum for trial. And it has been uniformly criticized by a host of scholarly commentators as a usurpation of legislative authority by the courts. The very fact that the practice is now so entrenched—notwithstanding clear contrary directions from Congress—compels this Court's review.

a. It is well established that courts must follow the plain language of a statute and may not depart from its "ordinary English" to pursue their own ideas of wise policy. *Barnett Bank of Marion County, N.A. v. Nelson*, 116 S. Ct. 1103 (1996). *See also Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992) ("courts must give effect to the clear meaning of statutes as written").

Section 1407(a)'s language is "clear as sunlight," (Pet. App. 30a (Kozinski, J., dissenting)), and its meaning could not be more obvious. It authorizes transfers only for "coordinated or consolidated pretrial proceedings." 47 U.S.C. § 1407(a). *See In re Korean Air Lines Disaster*, 829 F.2d 1171, 1174 (D.C. Cir. 1987) (R.B. Ginsburg, J.) (section 1407 "authoriz[es] transfers *only* for pretrial purposes") (emphasis added), *aff'd on other grounds*, 490 U.S. 122 (1989).

If a case has not been concluded by the time such pretrial proceedings are over, it *must* be returned to the district where it was initially filed: "Each action so transferred *shall be remanded* by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated." 28 U.S.C. § 1407(a) (emphasis added). Transferee courts thus have no authority under section 1407(a) to retain a case once pretrial proceedings conclude. The statute states that the case "shall be remanded," and remanded it must therefore be.

This clear statutory command is reinforced by the language of section 1404(a). As noted above, that provision only authorizes a district court to transfer a case to "any *other* district." 28 U.S.C. § 1404(a) (emphasis added). There is no way, in ordinary English, that the court granting such a transfer can itself be considered an "other" district court. The practice of self-transfer is therefore also inconsistent with the plain language of section 1404(a).

Moreover, if one looks beyond the plain text of the relevant statutes to their legislative history, it becomes even clearer that the lower court practice is flatly at odds with the Congressional design. The drafting history of section 1407 demonstrates that Congress specifically rejected the idea of authorizing broader transfers in the multidistrict context. The House Conference Report, for instance, gives several reasons—including the fact that "trial in the originating district is generally preferable from the standpoint of the parties and witnesses"—why the statute "does *not* . . . include the trial of cases in the consolidated proceedings" and would "not affect the place of trial in any case." H.R. Rep. No. 1130, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 1898, 1900, 1901 (emphasis added). If "future experience" demonstrated that "consolidation and coordination for

trial purposes" was justified, "amendments to the present language" would be necessary. *Id.* at 1902.[2]

This legislative history, moreover, is reinforced by the federal judicial report that was the genesis for the new statute. The Co-Ordinating Committee on Multiple Litigation, the body that proposed section 1407, emphasized that the proposed provision would not disturb the plaintiff's choice of forum for trial. The Committee's Report stated unequivocally that "[t]he major innovation proposed is transfer solely for pre-trial purposes," which would achieve "efficien[cy] and econom[y] . . . without losing the benefits of local trials in the appropriate districts." *In re Plumbing Fixture Cases,* 298 F. Supp. 484, 499 (J.P.M.L. 1968) (reprinting the Report).

It is thus evident that Congress—based on representations made by the federal judiciary as to how section 1407 would be read—made an explicit decision *not* to authorize transferee courts to hold trials, unless and until the legislature revisited the issue and amended the statute. Once the statute was passed, however, "the lower federal courts [did] by judicial fiat what Congress refused to do by statute in 1969: amend section 1407 to allow transfers for trial." Robert H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation,* 70 Cornell L. Rev. 779, 809 (1985). *See United States v. Noland,* 116 S. Ct. 1524, 1528 (1996) (where Congress "could have, but did not"

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[2] The Ninth Circuit's opinion incorrectly suggests that the legislative history supports its conclusion. Pet. App. 15a. The court's analysis rests on highly selective quotations from passages in which Congress noted that the statute did not do away with other mechanisms for transfer, such as section 1404. *Id.* As Judge Kozinski explained (Pet. App. 39a-40a n.8), the quoted passages, when read in context, clearly refer to the possibility of transfer by the court in which the case was filed, *not* by the transferee court. For instance, immediately following one passage quoted by the majority (Pet. App. 15a), the House Report makes clear that a further amendment would be necessary to allow the transferee court to keep the case for all purposes. *See* 1968 U.S.C.C.A.N. at 1902.

make a certain determination, "courts [can]not take it upon themselves" to make that same determination).

Given the abundant evidence establishing that self-transfer is fundamentally incompatible with the language and intent of sections 1404 and 1407, it is hardly surprising that commentators have uniformly criticized this practice. Professors Wright, Miller, and Cooper have stated, with characteristic understatement, that the practice is of "questionable" legitimacy. 15 Wright, Miller & Cooper, *Federal Practice & Procedure* § 3866, at 619 (2d ed. 1986). Other independent observers concur in more forceful terms.[a] As Judge Kozinski noted, "[r]e-

[a] Robert H. Trangsrud, *supra*, 70 Cornell L. Rev. at 804 ("The reasoning in these cases is demonstrably wrong."); Ross D. Cooper, *The Korean Air Disaster: Choice of Law in Federal Multidistrict Litigation*, 57 Geo. Wash. L. Rev. 1145, 1159 (1989) (practice of self-transfer "does not comport with the express language of section 1407 or section 1404 or with section 1407's legislative history"); Mike Roberts, *Multidistrict Litigation and the Judicial Panel, Transfer and Tag-Along Orders Prior to a Determination of Remand: Procedural and Substantive Problem or Effective Judicial Public Policy?*, 23 Mem. St. U. L. Rev. 841, 866 (1993) ("It is a leap in logic to conclude that causes of action not terminated upon dispositive motions should be retained in the transferee court under the rubric of § 1404(a), when the statutory language of § 1407 explicitly directs remand to the transferor court."); *Report of the American Bar Association Section of Antitrust Law Task Force to Review the Supreme Court's Decision in California v. ARC America Corp.*, 59 Antitrust L.J. 271, 302 (1990) ("[T]he use of Section 1404(a) transfers to consolidate multidistrict cases for trial is of dubious legal validity."); Blake M. Rhodes, Comment, *The Judicial Panel on Multidistrict Litigation: Time for Rethinking*, 140 U. Penn. L. Rev. 711, 734 (1991) ("[A] transferee court's use of § 1404(a) sets Congress's carefully crafted plan for multidistrict litigation on its head."); Stanley J. Levy, *Complex Multidistrict Litigation and the Federal Courts*, 40 Fordham L. Rev. 41, 64 (1971) (the language and legislative history of section 1407(a) are so clear that it "originally appeared to be a futile exercise for a 1407 transferee court to rule on a 1404 transfer motion"); John F. Cooney, Comment, *The Experience of Transferee Courts Under the Multidistrict Litigation Act*, 39 U. Chi. L. Rev. 588, 606 (1972) ("[T]he apparently mandatory nature of the remand clause

search discloses not a single commentator who has examined the question and found statutory support for the position taken by the federal courts." Pet. App. 36a (Kozinski, J., dissenting).

b. The Ninth Circuit gave three reasons in support of the result it reached. None withstands scrutiny.

First, the Ninth Circuit suggested that "longstanding practice" was itself a sufficient justification for self-transfer. Pet. App. 14a, 16a. The panel noted that "[r]espect for our brethren" made it reluctant to "accuse the JPML of violating the statute that created it" or to second-guess the many courts that had engaged in self-transfer. Pet. App. 14a n.7, 16a.

But past practice is no excuse for ignoring a clear Congressional command. As this Court recently recognized, the existence of long-standing errors in statutory interpretation requires action, not "hesitation," because "'[a]ge is no antidote to clear inconsistency with a statute.'" *Metropolitan Stevedore Co. v. Rambo*, 115 S. Ct. 2144, 2149 (1995) (quoting *Brown v. Gardner*, 115 S. Ct. 552, 557 (1994) (finding 60-year old agency interpretation inconsistent with statute)). Essentially, the Ninth Circuit is suggesting that, even if two wrongs don't make a right, two decades worth will—or at least we should pretend that they do, notwithstanding a clear conflict with an express statutory command. That has never been, nor should it be, the law.

Nor does the existence of a JPML rule permitting self-transfer transform an unlawful practice into a lawful one. Congress expressly provided that the JPML's rules must be consistent with its enabling statute and, indeed, all of

. . . implies that transferee courts lack this jurisdiction [to grant a section 1404 motion]."); George T. Conway III, Note, *The Consolidation of Multistate Litigation in State Courts*, 96 Yale L.J. 1099, 1102-03 (1987) ("[C]onsolidation for trial almost certainly defies both the letter of section 1407 and the intent of its drafters.") (internal footnote omitted).

federal law. 28 U.S.C. § 1407(f). *See also Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 212-14 (1976) (agency rules "cannot exceed the power granted . . . by Congress"); *Johnson v. Manhattan Ry.*, 289 U.S. 479, 503 (1933) (invalidating local court rule that was inconsistent with powers granted by Congress).

Section 1407, which circumscribes the authority of the JPML, unequivocally states that a transfer is only for "coordinated or consolidated pretrial proceedings" and that each case "shall be remanded" following pretrial proceedings "unless it shall have been previously terminated." 28 U.S.C. § 1407(a). The JPML rule violates this express statutory command. It states that "[e]ach transferred action that has not been terminated in the transferee district court shall be remanded . . . *unless ordered transferred by the transferee judge to the transferee or other district.*" JPML Rule 14(b) (emphasis added). The italicized language simply rewrites the JPML's enabling statute and adds an excuse for failure to remand that the statute does not recognize and does not permit.

Second, the Ninth Circuit noted that self-transfer "strongly promotes judicial efficiency, which was a primary purpose of the legislation that created the JPML." Pet. App. 16a. But, again, this Court has made clear that such concerns do not justify federal courts' disregard for the plain meaning of the statutes that define their authority. In *Finley v. United States*, 490 U.S. 545 (1989), for example, the Court acknowledged that the exercise of so-called pendant-party jurisdiction over state claims resulted in "efficiency and convenience" by allowing for the consolidation of related issues in a single proceeding. *Id.* at 555. Nevertheless, because the plain meaning of the relevant statutes demonstrated that Congress had not granted federal courts any such authority, the Court held that they lacked the power to hear such pendant-party claims. *See id.* at 547 (" 'courts which are created by written law, and whose jurisdiction is defined by written

law, cannot transcend that jurisdiction' ") (quoting *Ex Parte Bollman*, 4 Cranch 75, 93 (1807) (Marshall, C.J.)).

Congress established the balance between efficiency concerns and plaintiffs' traditional choice of forum when it wrote section 1407. The judiciary is not free to strike a different balance. As in *Finley*, the lower courts may not "trump" (Pet. App. 13a n.5) the plain language of sections 1404 and 1407—which evince Congress's judgment that preserving plaintiffs' choice of forum for trial is more important than efficiency—based on their own notions of wise judicial administration. *See also Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126 (1989) (Court is not free to pursue policy objective at expense of "unnatural" textual interpretation; "[o]ur task is to apply the text, not to improve upon it").

Third, the Ninth Circuit argued that section 1407's obligation to remand applies only to the JPML, not to the transferee court. Pet. App. 15a. On this theory, a transferee court is free to transfer a case to itself for trial pursuant to section 1404(a) without regard to the JPML's express duty under section 1407(a) to remand the case before trial. Pet. App. 15a-16a.

But the district court's power to preside in a transferred case is itself circumscribed by section 1407. The transferee court is assigned the case only for the limited purpose of conducting "consolidated" pre-trial proceedings. It cannot expand its power beyond what Congress has granted under the express terms of the statute. For that reason, the transferee court must remand the case once consolidated pretrial proceedings are complete and its authority under section 1407(a) has thus expired.

Moreover, the JPML's own rules instruct litigants to seek a remand, in the first instance, from the transferee court. *See* JPML Rule 14(d). This makes sense, since it is the judge presiding over the case, not the JPML panel, who will know when consolidated pre-trial proceedings are over and, thus, when the case must be remanded.

But in executing that delegated responsibility, the district court necessarily has the same underlying statutory obligation that the JPML would have if it handled requests in the first instance. The JPML cannot alter or broaden its authority by delegating it.[4]

Nor can the transferee court use its general authority under section 1404(a) to render a nullity section 1407(a)'s specific requirement that a case be remanded. It is a fundamental canon of statutory construction that laws should not be read in a way that makes any statutory provision superfluous. *See, e.g., Lane v. Peña*, 116 S. Ct. 2092, 2100 (1996); *Connecticut National Bank v. Germain*, 503 U.S. 249, 253 (1992). Yet if the district court could transfer a case pursuant to section 1404(a), then section 1407(a)'s requirement that the case be remanded at the conclusion of consolidated proceedings would serve no purpose at all. Congress provided only one exception to the JPML's mandatory duty to remand the case at the end of consolidated proceedings—where the case is "terminated" during coordinated pretrial proceedings. Congress did not create an exception for transfers; indeed, a statutory "command" that effectively said "the case shall be remanded unless it is transferred" (*i.e.*, unless it is not remanded) would be nonsensical.

[4] For this reason, it is bizarre for the Ninth Circuit to suggest (Pet. App. 16a-17a) that Lexecon should have sought relief directly from the JPML and that its failure to do so somehow left the district court with no choice but to transfer the case to itself "to avoid the absurdity of indefinitely suspended litigation, the pretrial proceedings of which have come to a close." Under the JPML's own rules, the proper practice was for Lexecon to bring its section 1407 argument to the district court, and not the JPML, in the first instance. Once the district court denied the remand motion, Lexecon was unable to pursue the matter with the JPML because the district court simultaneously transferred the case to itself, thereby depriving the JPML of authority to rule. *See* JPML Rule 14(b). Lexecon accordingly sought mandamus, which was the only immediate remedy available to it to vindicate the requirement of section 1407(a). Moreover, Lexecon objected to the self-transfer on the additional ground that it violated the express terms of section 1404(a).

Finally, even if section 1404(a)'s general transfer authority could somehow nullify the specific remand requirement of section 1407(a), the Ninth Circuit's ruling permitting *self*-transfer would still collide head-on with the plain language of section 1404(a). As we have explained, that provision authorizes a court to transfer a case only to some "other district or division," not to itself. Section 1404(a) thus provides a completely independent reason why the court of appeals' decision—and, indeed, all the lower court rulings on this issue—cannot pass muster.

c. The absence of a circuit conflict, though often a basis for denying review, in this case points in the other direction. The very fact that the judicial highjacking of JPML cases is so entrenched provides a powerful reason for this Court to intervene.

As early as 1971, the Second Circuit upheld a district court's self-transfer decision against a claim that it violated section 1407. *See Pfizer, Inc. v. Lord*, 447 F.2d 122, 124-25 (2d Cir. 1971). In the years since, the JPML itself has issued a rule that expressly contemplates self-transfer, and the lower courts, relying on that rule and on the perceived efficiency benefits of self-transfer, have uniformly determined that such transfers are lawful. The array of lower court precedent on this point now includes three square circuit court holdings,[5] as well as a host of district court rulings.[6] Indeed, the lower courts' under-

[5] In addition to the Second and Ninth Circuits, the Third Circuit so held in *In re Fine Paper Antitrust Litig.*, 685 F.2d 810, 819-20 & n.7 (3d Cir. 1982), *cert. denied*, 459 U.S. 1156 (1983) Two other appellate court decisions assume that self-transfer authority exists. *See In re Food Lion, Inc., Fair Labor Standards Act Litig.*, 73 F.3d 528, 532 n.7 (4th Cir. 1996); *Kohr v. Allegheny Airlines*, 504 F.2d 400, 402 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975).

[6] *See, e.g., In re Tax Refund Litig.*, 723 F. Supp. 922, 924 (E.D.N.Y. 1989); *In re Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo.*, 720 F. Supp. 1455, 1458 (D. Colo. 1988); *In re Dow Co. "Sarabond Products" Liab. Litig.*, 664 F. Supp. 1403, 1403-04 (D. Colo. 1987); *In re Air Crash Disaster at John F. Kennedy Int'l Airport*, 479 F. Supp. 1118, 1122-23 (E.D.N.Y. 1978); *In re Caesars Palace Sec. Litig.*, 360 F. Supp. 366, 374 (S.D.N.Y.

standing on this point is now so thoroughly entrenched that the Federal Judicial Center's *Manual for Complex Litigation (Third)* treats self-transfer as standard procedure. *See id.* § 21.61, at 117 & n.346.

As already noted, the existence of such longstanding errors in statutory interpretation requires action, not "hesitation," by this Court. *Metropolitan Stevedore*, 115 S. Ct. at 2149. This Court has accordingly granted review to address such errors in interpretation even where *every* circuit court's precedents upheld the practice at issue. *See Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 114 S. Ct. 1439 (1994); *id.* at 1456 (Stevens, J., dissenting) (practice addressed by Court had been upheld "in *hundreds* of judicial and administrative proceedings in every circuit in the federal system"). *See also Finley*, 490 U.S. at 558 (Stevens, J., dissenting) (district court practice reviewed—and reversed—by Court had been supported by "overwhelming consensus of federal judges").

The statutory question in this case particularly merits the Court's attention because it involves the limits of the authority that Congress has granted to the lower federal courts. As the Court has recognized since its earliest days, ensuring that the federal courts stay within the bounds of the authority Congress has vested in them is an issue of paramount importance. *See Ex Parte Bollman, supra.* Indeed, in recognition of this principle, just last Term the Court reviewed a case involving the statutory scope of federal court authority even though only one circuit had ever passed on the statutory question at issue. *See Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 116 S. Ct. 637 (1996) (ruling upon federal court authority under the Expedited Funds Availability Act). And review of such questions is especially warranted where the federal court practice has a significant effect on the substantive rights of a wide class of litigants—in this instance, by robbing multidistrict litigation plaintiffs of their historical right to choose their forum and subjecting them to trial in distant places before potentially hostile juries.

1973); *In re Aircrash Near Duarte, Cal.*, 357 F. Supp. 1013, 1015 (C.D. Cal. 1973); *Greyhound Computer Corp. v. I.B.M. Corp.*, 342 F. Supp. 1143, 1145 (D. Minn. 1972); *In re Viatron Computer Systems Corp. Litig.*, 86 F.R.D. 431, 432-33 (D. Mass. 1980); *In re Master Key Antitrust Litig.*, 70 F.R.D. 23, 28 (D. Conn. 1975); *In re Penn Central Commercial Paper Litig.*, 62 F.R.D. 341, 345 (S.D.N.Y. 1974), *aff'd sub nom. Shulman v. Goldman, Sachs & Co.*, 515 F.2d 502 (2d Cir. 1975).

II. THE NINTH CIRCUIT'S RULING WRONGLY AUTHORIZES DISTRICT COURTS TO GO OUTSIDE THE FOUR CORNERS OF A COMPLAINT AND RELY ON THEIR OWN ANALYSIS OF PUBLIC RECORD MATERIALS TO DECIDE DISPUTED QUESTIONS OF FACT AT THE MOTION TO DISMISS STAGE

The Ninth Circuit's ruling also implicates important public policy concerns regarding the integrity of the legal profession. Respondents are the nation's leading filers of securities class action suits. In enacting the Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737 (1995), with bipartisan majorities in both houses, Congress emphasized the serious societal problems and injuries to innocent parties caused by unethical class action lawyers. *See* H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. 31-32 (1995). *See also* 141 Cong. Rec. S8894 (daily ed. June 22, 1995) ("it has become increasingly clear that securities class actions are extremely vulnerable to abuses by entrepreneurs masquerading as lawyers") (remarks of Sen. Dodd).

Here, Lexecon alleged that respondents fabricated evidence to support claims that they privately acknowledged were baseless, attempted to use their meritless suit in an attempt to extort concessions from Lexecon and its clients, intimidated witnesses, defrauded the courts, and then engaged in wholesale document destruction to cover-up their misconduct. These are serious allegations, of more than private concern, that should not have been rejected without careful consideration on the merits as required by

the Federal Rules of Civil Procedure and this Court's precedents.

This Court established long ago that, in ruling on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court must accept the truth of all allegations in the plaintiff's complaint. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 411 n.2 (1986) (collecting cases). The text of Rule 12 itself makes plain that courts may not stray beyond the four corners of the pleadings to resolve such motions: "If . . . matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment . . . and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

The Ninth Circuit, however, discarded these fundamental procedural protections as outmoded "formalism." Pet. App. 23a. In the court's view, it is perfectly appropriate for a court to use any material in the "public record"—which could include, for example, newspaper articles, investigative reports, and all sorts of public filings by private parties—as a basis for rejecting, at the motion to dismiss stage, the factual assertions in a plaintiff's complaint. *Id.* This ruling conflicts with decisions in other circuits and threatens to eviscerate the traditional protection afforded plaintiffs by Rule 12(b)(6).

a. The Ninth Circuit affirmed the dismissal of Lexecon's malicious prosecution claim and its abuse of process claim. In both instances it went beyond the four corners of the complaint to resolve disputed issues of fact.

Under Arizona law, a necessary element of Lexecon's malicious prosecution claim was that the *Lincoln Savings* case had terminated favorably to Lexecon. Under Arizona law, favorable termination is a question of fact.[7] Lexecon's

[7] *See Bradshaw v. State Farm Mut. Auto. Ins. Co.*, 758 P.2d 1313, 1319 (Ariz. 1988); *Frey v. Stoneman*, 722 P.2d 274, 279 (Ariz. 1986).

complaint accordingly detailed the circumstances leading up to the dismissal of Lexecon from that suit and why those circumstances demonstrated that the suit terminated favorably to Lexecon. Lexecon C.A. Excerpts 68-75, 89.

After Lexecon's complaint was filed in Chicago, Judge Bilby, who had presided over the earlier *Lincoln Savings* case in Arizona, somehow obtained a copy and read it "more out of intellectual curiosity than anything." Milberg Weiss C.A. Excerpts 359. Judge Bilby then issued an extraordinary "order" (*see* Pet. App. 7a-8a n.2) describing why he disagreed with certain factual allegations in Lexecon's Chicago complaint concerning Lexecon's dismissal from the *Lincoln Savings* case.[8] Judge Bilby stated that the purpose of his order was to give "the judge in Chicago . . . something to rely upon." Milberg Weiss C.A. Excerpts 441. Judge Bilby recognized that his recollection of various off-the-record events made him a potential witness in the Lexecon case in Chicago, but stated "that ain't going to happen." *Id.* at 437. Moreover, when the *Lexecon* case later came before the JPML, Judge Bilby sent the JPML a letter recusing himself because of his "involvement" in resolving the underlying case.

The Ninth Circuit held that the factual characterizations of the *Lincoln Savings* litigation in Judge Bilby's order "plainly indicated that the litigation was not 'terminated' in Lexecon's favor." Pet. App. 22a. Yet, as Judge Kozinski noted below, that "order" amounted to "little more than testimony" by a recused judge who was not present during key events described in Lexecon's complaint and whose statements were not "subject to the

[8] The crux of Judge Bilby's disagreement with Lexecon's Chicago complaint focused on the circumstances surrounding Lexecon's decision to return its professional fees of approximately $700,000 from its Lincoln Savings engagement, which it first announced four months *after* its dismissal from *Lincoln Savings*. In his order, Judge Bilby expressed his view, contrary to the allegations in Lexecon's complaint and what Judge Bilby himself said at the time he dismissed Lexecon as a "non-settling defendant," that this payment was a disguised quid pro quo for Lexecon's earlier dismissal from *Lincoln Savings*.

normal safeguards applicable to witnesses." Pet. App. 47a n.16 (Kozinski, J., dissenting).

The treatment of Lexecon's abuse of process claim was even more extraordinary. Here, the Ninth Circuit itself purported to make findings of fact. Under Arizona law, an abuse of process claim requires proof that legal process was used primarily to accomplish a purpose for which it was not designed. The complaint alleged that respondents brought suit against Lexecon in an attempt to ruin Lexecon's reputation and destroy Professor Fischel's credibility as an expert witness. Lexecon was prepared to substantiate those allegations, but was never given an opportunity to do so.

The Ninth Circuit panel stated:

> [T]he task of this court is to determine whether the addition of Lexecon as a defendant in the [*Lincoln Savings*] litigation had as its primary purpose an objective for which that litigation was not intended [*i.e.*, "to inflict harm on Lexecon or Fischel"]. We hold that no such objective existed . . . .

Pet. App. 27a, 28a. The panel, of course, had no such task. The job of a court in dealing with a 12(b)(6) motion is not to make findings of fact, but to determine whether the *allegations* in the complaint, which the court must assume to be true, are sufficient to state a claim.

If factual disputes—particularly disputes about motive—can be decided *conclusively* at the motion to dismiss stage based on a court's own analysis of public record materials, plaintiffs have no assurance that they will ever have an opportunity to prove their case. The Ninth Circuit asked rhetorically: "[W]hy should the district court be limited by Lexecon's selective telling of a story?" Pet. App. 23a. But that is what pleading is all about. Lexecon gets a chance to tell its side of the story, and the court *must* assume the truth of that story for purposes of a 12(b)(6) motion.

b. In sharp contrast to the Ninth Circuit's decision, other courts of appeals have placed careful limits on the practice of going beyond the four corners of the complaint at the motion to dismiss stage. In particular, they have made clear that public record materials may be considered on a 12(b)(6) motion only when the facts in the public record are so clearly established that they can properly be the subject of judicial notice. *See, e.g., Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1017-18 (5th Cir. 1996); *Winchester Homes, Inc. v. Osmose Wood Preserving, Inc.*, 37 F.3d 1053, 1054 (4th Cir. 1994); *Henson v. CSC Credit Servs.*, 29 F.3d 280 (7th Cir. 1994); *Allen v. Westpoint-Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir. 1991).

In those courts, public record evidence may be used at the motion to dismiss stage only if the relevant issue is "not subject to reasonable dispute." Fed. R. Evid. 201(b); *see Lovelace*, 78 F.3d at 1018 (court may look to SEC filings at motion to dismiss stage to determine their contents, a matter not subject to dispute, but may not determine at that stage whether those contents are truthful; citing Fed. R. Evid. 201); *Americanos v. Carter*, 74 F.3d 138, 141 (7th Cir.) (court could take notice of facts that were "easily ascertainable" from the face of a state statute), *cert. denied*, 116 S. Ct. 1853 (1996). The evidence relied upon by the Ninth Circuit here—particularly the after-the-fact perceptions of one participant in the earlier litigation—was plainly subject to reasonable dispute. Thus, these courts would not have reached the conclusion that the Ninth Circuit did here.

Indeed, application of these standards has led the Sixth Circuit to reach a conclusion directly contrary to the Ninth Circuit's on facts similar to those presented here. In *Friedman v. United States*, 927 F.2d 259 (6th Cir. 1991), the district court, in deciding a motion to dismiss, had relied on a prior decision to supply a "factual basis to consider whether plaintiff had a valid claim." *Id.* at

261. Unlike the Ninth Circuit—which sanctioned just such behavior here—the Sixth Circuit concluded that the court should not have noticed such contested facts at the motion to dismiss stage. *Id. See also Newman & Schwartz v. Asplundh Tree Expert Co.*, 102 F.3d 660, 662 (2d Cir. 1996) (concluding that district court "improperly relied upon extra-complaint information" to resolve a disputed issue on a 12(b)(6) motion); *Baker v. Putnal*, 75 F.3d 190, 197 (5th Cir. 1996) (reversing district court's order dismissing plaintiff's complaint on grounds that it failed to accept as true plaintiff's factual allegations and adopted, instead, evidence outside the pleadings "as fact without acknowledging any contradiction with the complaint").

The Ninth Circuit's decision to rely upon public record evidence to resolve the disputed question of motive is particularly remarkable. This Court has long established that determinations as to motive normally require credibility determinations of the kind that can only be made after trial. *See United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949) ("Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them."); *see also Pullman-Standard v. Swint*, 456 U.S. 273, 287-93 (1982). Accordingly, other circuit courts have made clear that motive determinations are generally not suitable for resolution even at summary judgment, much less on Rule 12(b)(6) motion. *See, e.g., Leonard v. Frankfort Elec. & Water Plant Bd.*, 752 F.2d 189, 194 (6th Cir. 1985) ("questions of intent or motive are particularly ill-suited for disposition on summary judgment"); *Triad Assocs. v. Robinson*, 10 F.3d 492, 497 (7th Cir. 1993) (allegations of intent need only be pleaded generally and satisfy "notice pleading minimum" to survive motion to dismiss).

"Formalism has its place," the Ninth Circuit stated, "but that place is not here." Pet. App. 23a. In fact, it is precisely here—in judging a motion to dismiss a well-

pleaded complaint—that formalism does have its place as a critical protection for plaintiffs who have not yet been afforded a chance to prove their case. The Court should accordingly grant certiorari to resolve the intercircuit conflict on the appropriate use of public records at the motion to dismiss stage and to restore Rule 12(b)(6)'s traditional protections to plaintiffs.[9]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL W. MCCONNELL
STEPHEN M. SHAPIRO
MICHELE L. ODORIZZI
MAYER, BROWN & PLATT
190 S. LaSalle Street
Chicago, IL 60603
(312) 701-7201

KENNETH S. GELLER
MAYER, BROWN & PLATT
2000 Pennsylvania Ave., N.W.
Suite 6500
Washington, D.C. 20006
(202) 463-2000

MICHAEL K. KELLOGG
Counsel of Record
MARK C. HANSEN
JEFFREY A. LAMKEN
AUSTIN C. SCHLICK
SEAN A. LEV
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900

Counsel for Petitioners

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[9] If the Court grants certiorari and reverses on the first issue, then the Ninth Circuit's decision on the 12(b)(6) issue will have no further force and effect and the Court need not, if it so chooses, reach that issue. The case will essentially recommence in Chicago from the date it should have been remanded and the Arizona court's 12(b)(6) ruling will become interlocutory. As a result, any appellate review of the 12(b)(6) decision will take place in the Seventh Circuit and, if necessary, be subject to review by this Court at that time.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-15759

D.C. No. CV-93-01087-JMR

IN RE: AMERICAN CONTINENTAL CORPORATION/LINCOLN SAVINGS & LOAN SECURITIES LITIGATION

LEXECON INC.; DANIEL R. FISCHEL,
Plaintiffs-Appellees,

v.

MILBERG WEISS BERSHAD HYNES & LERACH, a partnership; PATRICK COUGHLIN; WILLIAM S. LERACH; KEVIN P. RODDY; LEONARD B. SIMON; MELVYN I. WEISS; PATRICIA HYNES; MICHAEL C. SPENCER; STEPHEN R. STEINBERG,
Defendants-Appellees.

No. 95-16403

D.C. No. CV-93-01087-JMR

IN RE: AMERICAN CONTINENTAL CORPORATION/LINCOLN SAVINGS & LOAN SECURITIES LITIGATION

LEXECON INC.; DANIEL R. FISCHEL,
Plaintiffs-Appellants,

v.

MILBERG WEISS BERSHAD HYNES & LERACH, a partnership; PATRICK COUGHLIN; WILLIAM S. LERACH; KEVIN P. RODDY; LEONARD B. SIMON; MELVYN I. WEISS; PATRICIA HYNES; MICHAEL C. SPENCER; STEPHEN R. STEINBERG, COTCHETT, ILLSTON & PITRE; JOSEPH COTCHETT, SUSAN ILLSTON,
Defendants-Appellees,

Nos. 95-16595; 95-16754

D.C. No. CV-93-01087-JMR

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Defendants-Appellees,
Cross-Appellants.

Appeals from the United States District Court
for the District of Arizona
John M. Roll, District Judge, Presiding

Argued and Submitted
June 13, 1996—San Francisco, California

Filed December 20, 1996

Before: Joseph T. Sneed, Harry Pregerson, and Alex Kozinski, Circuit Judges.

Opinion by Judge Sneed;
Dissent by Judge Kozinski

OPINION

SNEED, Circuit Judge:

Of the many consequences of the failure of Lincoln Savings and Loan and its parent, American Continental Corporation, the litigation that produced these consolidated appeals was just one. At the heart of these appeals is a suit by Lexecon Inc. against a number of the attorneys who represented the consolidated class of investors who lost money in the collapse of Lincoln Savings and its parent. Lexecon is a law and economies consulting firm that frequently serves as a defense expert in securities class actions prosecuted by the law firms that are defendants here. Lexecon had prepared several reports for Lincoln Savings and American Continental, and consequently became a target of the class' claims. In due course these claims were resolved. Thereafter Lexecon and its principal, Professor Daniel R. Fischel of the University of Chicago Law School, brought an action for, inter alia, malicious prosecution and defamation in federal district court for the Northern District of Illinois against several of the class attorneys—Milberg Weiss Bershad Hynes & Lerach and affiliated attorneys ("Milberg Weiss"), and Cotchett Illston & Pitre and affiliated attorneys ("Cotchett").[1] The underlying theory is that Milberg Weiss and

[1] The firm of Greenfield & Chimicles was also a defendant initially, but is not involved in these appeals.

Cotchett wrongfully dragged Lexecon into the Lincoln Savings litigation to satisfy a personal vendetta against Lexecon and Fischel. The Judicial Panel on Multidistrict Litigation ("JPML") transferred this case to District of Arizona and assigned it to Judge John M. Roll.

The resolution of Lexecon's claims in Judge Roll's court generally was unfavorable, as were its rulings on Milberg Weiss' counterattacks. These have resulted in four appeals to this court which have been consolidated.

In No. 95-16595, Lexecon appeals the adverse judgment on its malicious prosecution and abuse of process claims and the denial of its motion for leave to amend, as well as the denial of its motion to remand the case to Illinois. In No. 95-16403, Lexecon appeals from the final judgment in favor of the Cotchett defendants.

Milberg Weiss appeals, in No. 95-15759, the district court's denial of its efforts to obtain injunctive relief against Lexecon's prosecution of its claims, and, in No. 95-16754, the dismissal of its counterclaims against Lexecon.

We have jurisdiction under 28 U.S.C. § 1291, and we affirm the judgments of the district court.

I.

SOURCES OF THIS LITIGATION

Following the collapse of Lincoln Savings, investors residing in many districts of the federal judicial system brought actions charging violations of federal securities laws and RICO. In due course, these cases were transferred to the District of Arizona, consolidated into MDL 834 (sometimes designated as "*Shields*" or "*Lincoln Savings*") and assigned to Judge Richard Bilby.

As early as 1990, the consolidated plaintiff class, now represented by (among others) Milberg Weiss and Cotchett, sought to add Lexecon and Fischel as defendants by

filing a fifth amended complaint. Judge Bilby denied their motion to do so without prejudice. In February 1991, Judge Bilby granted the class' motion to file a sixth amended complaint, which added only Lexecon as a defendant, and alleged that:

> during 1987 and 1988 defendant Lexecon was engaged by ACC/Lincoln to perform services, including writing reports advocating the safeness of Lincoln's operations and the value of ACC/Lincoln's assets which were submitted to federal and state regulators in order to persuade them not to take regulatory action adverse to Lincoln.

Following a period of discovery, Lexecon's motion for summary judgment was denied. *See In re American Continental Corp./Lincoln S&L Sec. Litig.*, 794 F. Supp. 1424, 1448-49 (D. Ariz. 1992). Judge Bilby found there existed material issues as to whether Lexecon's reports were false and misleading, and whether Lexecon possessed reckless scienter as to Lincoln's fraudulent activities. In March 1992, the trial commenced. Almost four months later, and shortly before the close of evidence, Lexecon moved for a directed verdict. Judge Bilby denied the motion, again finding a jury question as to the level of Lexecon's knowledge of, and involvement in, Lincoln Savings' actions and practices.

On June 22, 1992, the class attorneys and Lexecon's counsel met in Judge Bilby's chambers to consider a means by which Lexecon's exposure to a jury verdict could be resolved without harmful consequences to its professional credibility and reputation. In furtherance of this end, Lexecon urged that any agreement that might be reached not be designated a "settlement." To accommodate Lexecon's concern, the term "resolution" was adopted. The terms of the resolution provided: First, that the court would enter an order dismissing Lexecon without prejudice; second, that the parties would sign a stipulation dismissing Lexecon with prejudice, which stipulation would be held

by Judge Bilby to be entered on the court's record only if a new suit was initiated against Lexecon on the same claims; and, third, that Lexecon would provide class services as a subcontractor to Touche Ross who, as another defendant in MDL 834, had settled its liability for $7.5 million. The resolution also placed restrictions on class counsel's ability to cross-examine Lexecon experts in future lawsuits about Lexecon's involvement in MDL 834.

This unusual arrangement was implemented, although because of disagreements between Lexecon and class counsel, Lexecon discharged its obligations by turning over to the class the approximately $700,000 it had received in professional fees from Lincoln Savings and American Continental, rather than performing the class services. This discharge was accomplished in October 1992.

Those who then thought that the concerns of Lexecon had been relieved were wrong. On November 25, 1992, Lexecon filed in the Northern District of Illinois (Lexecon's home state) the action now before us on appeal. The complaint set forth claims for malicious prosecution, abuse of process, tortious interference, defamation, and common law and statutory commercial disparagement. In June 1993, the JPML transferred the case to the District of Arizona for consolidation with MDL 834, and assigned it to Judge Roll because Judge Bilby had recused himself.

Judge Bilby's recusal obviously resulted in part from his reaction on learning of Lexecon's suit in Illinois. He arranged a telephonic hearing held on December 7, 1992, and therein charged Lexecon with what he viewed as its incorrect portrayal of the resolution of its role as a defendant in MDL 834. Following this hearing and the submission of letter briefs by the parties, Judge Bilby placed an order in the record of MDL 834 in which he found portions of Lexecon's Illinois complaint to be "a false description of the conditions under which Lexecon

was dismissed from this case."[2] The key portions of his order disputed Lexecon's characterization of its payment to the Lincoln Savings class as "voluntary," and of

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[2] The text of this order reads as follows:

> On August 12, 1992, Lexecon Inc. was dismissed from the above captioned matter. As this dismissal was without prejudice the Court retained jurisdiction and uses its powers now to clarify the terms and conditions of that dismissal. Moreover, pursuant to Fed. R. Civ. P. 60(a) the Court of its own initiative may correct any errors or omissions of the record. This Order in no way "rewrites" history, rather, it serves to clarify the terms and conditions of the Class Plaintiffs and Lexecon's agreement. This act of Court is required due to certain allegations made by Lexecon in *Lexecon Inc. v. Milberg Weiss Bershad Spechrie & Learch* [sic], Case No. 92 C 7768 (N.D. Ill. Nov. 25, 1992), a suit filed against Class Plaintiffs' counsel in the Northern District of Illinois.
>
> Specifically, in that Complaint Lexecon alleges:
>
> > 63. In June 1992, after all the evidence was in, but before closing arguments, Defendants finally agreed to dismiss Lexecon, implicitly acknowledging the lack of merit in their complaint.
> >
> > 64. At the same time, because it believed that its professional services had been misused by Lincoln and [Charles H.] Keating [Jr.], Lexecon voluntarily undertook to benefit the class by providing claims administration services (computerizing mailing lists, processing claims and the like). When Defendants' complaints to the court made it impossible for Lexecon to provide these services, Lexecon decided to benefit the class instead by voluntarily returning the professional fees paid to it by Lincoln and Keating...
> >
> > • • •
> >
> > 92. The *Shields* case was terminated in Lexecon's and Fischel's favor.
>
> *Lexecon Inc. v. Milberg Weiss Bershad Spechrie & Learch* [sic]. Complaint, ¶ 63, ¶ 64 and ¶ 92.
>
> The Court finds these paragraphs to be a false description of the conditions under which Lexecon was dismissed from this case. Although counsel for Lexecon at hearing argued that ¶ 93 [sic] is pled merely to satisfy one of the elements of

the resolution as a termination of the litigation in Lexecon's favor:

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malicious prosecution, it does not meet with reality and is factually incorrect.

The Class Plaintiffs/Lexecon resolution was a bargained-for exchange wherein consideration flowed both ways. Lexecon agreed to perform through Touche Ross certain administrative services to the Class Plaintiffs. Subsequently, Lexecon paid approximately $900,000 in cash instead of performing the services. (footnote omitted)

In return, Plaintiffs' counsel agreed to dismiss Lexecon from the case without prejudice and to not cross-examine the Lexecon experts about any "settlement" by Lexecon of the case. The fact that a case was filed and subsequently resolved without mention of the terms was always to be a proper subject of cross-examination. This aspect of the resolution was included because Lexecon and Mr. Fischel were concerned that if the term "settlement" was used, Lexecon experts would be open to in-depth cross-examination in courts across the country with consequent injury to its business. Hence, the term "settlement," and the connotations it might imply, was explicitly avoided and the term "resolution" used instead.

Counsel for Lexecon has furnished the Court with a portion of a transcript from the Eastern District of Tennessee, Northern District in a case captioned, *FDIC v. Ernst & Whitney*, CIV 3-87-364 (E.D. Tenn. Oct. 1, 1992) as evidence of Class Plaintiffs' Counsels' bad faith breach of the resolution. A copy of this transcript is attached as Exhibit "A".

It is the finding of this Court that Mr. Spencer cross-examined the Lexecon expert in accordance with the agreement reached with Lexecon in MDL 834 in every respect. Mr. Spencer never made any reference to the MDL 834 settlement before the jury in the Tennessee case, nor asked any questions in that case concerning a settlement in MDL 834. Indeed, Ms. Brickell on redirect, made the point that the FDIC had hired Lexecon *after* the Lincoln project. As long as Plaintiffs' counsels' future conduct is in accordance with Mr. Spencer's cross-examination in the Tennessee case, then the Lexecon resolution will not have been breached.

Moreover, under no circumstances was the Class Plaintiffs/Lexecon compromise a resolution in favor of *either* party or, more importantly, an adjudication on the merits. Instead, it was a bargained-for resolution of a disputed matter from which both parties benefited.

The Class Plaintiffs/Lexecon resolution was a bargained-for exchange wherein considerations flowed both ways.

. . .

Moreover, under no circumstances was the Class Plaintiffs/Lexecon compromise a resolution in favor of either party or, more importantly, an adjudication on the merits. Instead, it was a bargained-for-resolution of a disputed matter from which both parties benefited.

Lexecon's attempt to appeal this order to this court failed because there was as yet no final judgment in MDL 834. Lexecon took no appeal from the final judgment subsequently entered in March 1994.

Meanwhile, Judge Roll had begun his work on the case. In November 1993 he dismissed Lexecon's malicious prosecution and abuse of process claims. *In re American Continental Corp./Lincoln S&L Sec. Litig.*, 845 F. Supp. 1377, 1383-86 (D. Ariz. 1993). All the defendants in this case then answered, and Milberg Weiss filed counterclaims for breach of contract, fraud, unjust enrichment, and promissory estoppel. Discovery proceeded, followed by the defendants' motions for summary judgment.

In March 1994, before Judge Roll resolved the summary judgment motions, final judgment was entered in MDL 834. Lexecon thereupon moved under 28 U.S.C. § 1407 for a remand of its case to the Northern District of Illinois. Judge Roll instructed Lexecon to renew this motion after the close of discovery, which Lexecon did in November 1994. In response, Milberg Weiss moved to make the transfer to Arizona permanent under 28 U.S.C. §§ 1404(a) and 1406, and additionally moved for preliminary and permanent injunctions against the pursuit of this action, as well as all other claims made by Lexecon. Judge Roll denied the latter motion, and Milberg Weiss appealed. No. 95-15759.

Prior to ruling on the remand and transfer motions, Judge Roll granted summary judgment against Lexecon on its claims of tortious interference, commercial disparagement, and defamation based on the dissemination of Milberg Weiss' sixth amended complaint. *In re American Continental/Lincoln S&L Sec. Litig.*, 884 F. Supp. 1388 (D. Ariz. 1995). Lexecon's defamation claim based on a sentence in a letter written by a Milberg Weiss partner, Kevin P. Roddy, to, and which appeared in, *The National Law Journal*, survived. Judge Roll also dismissed Milberg Weiss' counterclaims. *Id.* at 1397. Because the Cotchett defendants, who were never Lexecon's principal target in this litigation, had no part in the Roddy letter, Judge Roll entered a final judgment in their favor pursuant to Fed. R. Civ. P. 54(b). Lexecon timely appealed that judgment. No. 95-16403.

Thereafter, Judge Roll entered an order denying Lexecon's motion to return the case to the JPML for remand to the Northern District of Illinois, and granting the Milberg Weiss motion to make the transfer to the District of Arizona permanent. Lexecon appealed the remand and transfer decision to this court by means of a petition for writ of mandamus, which was denied without prejudice as to Lexecon's raising the issue on direct appeal.

The climactic event in Judge Roll's court occurred on July 25-28, 1995, when Lexecon's defamation claim based on the Roddy letter to *The National Law Journal* was tried to a jury. The jury verdict favored Milberg Weiss. Lexecon appealed the subsequently entered final judgment, in particular the district court's transfer order and its dismissal of Lexecon's malicious prosecution and abuse of process claims. No. 95-16595. Milberg Weiss cross-appealed the dismissal of its counterclaims. No. 95-16754.

The order in which this court will address the issues before us on this appeal is as follows:

1. The permanent transfer of Lexecon's case from the Northern District of Illinois to the District of Arizona.
2. The denial of Milberg Weiss' motion for preliminary and permanent injunctions against the pursuit by Lexecon of its claims against Milberg Weiss and Cotchett.
3. The dismissal of Lexecon's malicious prosecution and abuse of process claims.
4. The dismissal of Milberg Weiss's counterclaims.

II.

THE PERMANENT TRANSFER TO THE DISTRICT OF ARIZONA
Nos. 95-16595 and 95-16403

The JPML transferred Lexecon's action to the District of Arizona pursuant to its authority under 28 U.S.C. § 1407(a), which states:

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section. . . . Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated[.]

The decision of the court below to transfer Lexecon's sole surviving claim to itself for trial, and its refusal to refer the case to the JPML for remand to Illinois, are vigorously challenged by Lexecon—and not for the first time.

Prior to the trial on the defamation claim, Lexecon brought before this court a petition for a writ of manda-

mus seeking: (1) to vacate the district court's order permanently transferring the remaining claim to the District of Arizona; and (2) to direct the district court to refer the case to the JPML for remand to the Northern District of Illinois. In an unpublished disposition, this court denied the petition and, while recognizing that Lexecon's arguments based on 28 U.S.C. §§ 1407 and 1404(a) might not lack merit, pointed out that they were contrary to existing case law and Multidistrict Litigation Rule 14(b). We explicitly recognized that the issue could be raised in an appeal on the merits. The dissent vigorously argued that 28 U.S.C. § 1407(a) authorizes the JPML to transfer a case for pretrial proceedings only, precluding a section 1404(a) transfer for a trial on the merits by the transferee court to itself, and that Multidistrict Litigation Rule 14(b) lacks a statutory basis. We now revisit these issues.

We review the district court's transfer under 28 U.S.C. § 1404(a) for an abuse of discretion. *Lou v. Belzberg*, 834 F.2d 730, 734 (9th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988). We review de novo the district court's interpretation of its duties under 28 U.S.C. § 1407. *Monrad v. FDIC*, 62 F.3d 1169, 1171 (9th Cir. 1995).

A. *Authority for the Section 1404(a) Transfer*

The power of a section 1407 transferee court to transfer a case to itself for trial has been recognized, explicitly or implicitly, by the courts that have considered the issue.[3] Patricia D. Howard, the Clerk of the JPML, has stated:

[3] *See, e.g., In re Food Lion, Inc., Fair Labor Standards Act Litig.*, 73 F.3d 528, 532 n.7 (4th Cir. 1996); *Washington Pub. Util. Group v. United States Dist. Ct.*, 843 F.2d 319, 326 (9th Cir. 1988); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1178 (D.C. Cir. 1987), *aff'd*, 490 U.S. 122 (1989); *Kohr v. Allegheny Airlines*, 504 F.2d 400, 402 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975); *Pfizer, Inc. v. Lord*, 447 F.2d 122, 124-25 (2d Cir. 1971); *Matter of Mahurkar Double Lumen Hemodialysis Catheter Patent Litig.*, 750 F. Supp. 330, 332 (N.D. Ill. 1990); *In re Air Crash Disaster*, 476 F. Supp. 445, 450 (J.P.M.L. 1979); *In re CBS Color Tube*, 342 F. Supp. 1403, 1404-05 (J.P.M.L. 1972).

> Although the Panel's power for the most part is limited to transfer for pretrial only, it is not uncommon for a transferee judge assigned by the Panel to transfer to his own or another district under 28 U.S.C. §§ 1404(a) or 1406 the actions which were previously assigned to him or her by the Panel under Section 1407.[4]

Permitting the transferee court to transfer a case to itself upon completion of its pretrial work often promotes efficiency in the disposition of the case or cases.[5] The time required for a new judge to become acquainted with the litigation is eliminated, as is the possibility of conflicting or duplicative rulings and proceedings. The above reasons strongly favored trial by the transferee court in this case, where pretrial proceedings left only one claim to be resolved by a trial that was scheduled to begin immediately and conclude in four days.

Moreover, the transferee court is empowered to dispose of the cases transferred to it by means of summary judgment or dismissal.[6] Therefore, logic supports its abil-

[4] Patricia D. Howard, "A Guide to Multidistrict Litigation," 124 F.R.D. 479, 479 (1989); *see also* Stanley A. Weigel, "The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts," 78 F.R.D. 575, 581 n.42 (1977); Moore's Federal Practice, *Manual for Complex Litigation* ¶ 31.13 at 251 n.785 (3d ed. 1995) ("Although transfer by the panel under § 1407 is only for pretrial purposes, the transferee court may find it appropriate to transfer cases to itself for trial under 28 U.S.C. § 1404 or § 1406.").

[5] Judge Kozinski, in his dissent, decries the fact that in multidistrict litigation cases concerns for judicial economy trump the usual deference to a plaintiff's choice of forum. We fail to see the problem here. Judicial economy is extremely important in multidistrict litigation: sufficiently important that Congress enacted a special statute, 28 U.S.C. § 1407, to ensure that in multidistrict cases the interest in judicial economy would not be overridden by deference to a plaintiff's choice of forum.

[6] *See, e.g., In re Food Lion, Inc.*, 73 F.3d at 532; *In re Korean Air Lines*, 829 F.2d at 1178; Weigel, "The Judicial Panel on Multidistrict Litigation," 78 F.R.D. at 582-83.

ity to dispose of the case, at least under the circumstances present here, by trial.

Despite longstanding practice and the efficiency arguments, Lexecon argues that 28 U.S.C. § 1407(a) requires remand for trial. The provision states in relevant part:

> Each action so transferred *shall be remanded by the panel* at or before the conclusion of such pretrial proceedings to the district from which it was transferred *unless it shall have been previously terminated* (emphasis added).

Equally specific is JPML R. 14(b), promulgated under the authority granted the JPML by 28 U.S.C. § 1407(f):

> Each transferred action that has not been terminated in the transferee district court shall be remanded by the Panel to the transferor district for trial, unless ordered transferred by the transferee judge to the transferee or other district under 28 U.S.C. § 1404 (a) or 28 U.S.C. § 1406.

This conflict between statute and rule, while apparent, is not real.[7] Congress in enacting section 1407 in 1968

[7] The dissent contends that Judge Roll contravened the text of 28 U.S.C. §§ 1404(a) and 1407(a) by denying Lexecon's motion to return the case to the JPML and granting Milberg Weiss' motion to transfer the case permanently to the District of Arizona. In making this argument, the dissent conveniently ignores the text of JPML Rule 14(b), which clearly interprets section 1404(a) to authorize the transferee judge to transfer the case to the transferee district. The dissent also conveniently ignores the text of 28 U.S.C. § 1407(f), which explicitly grants the JPML broad authority to "prescribe rules," such as Rule 14(b), as long as those rules are "not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure." 28 U.S.C. § 1407(f).

Implicit in the dissent's argument, then, is a claim that Rule 14(b) is inconsistent with sections 1404(a) and 1407(a). The dissent is far too quick to accuse the JPML of violating the statute that created it. It is useful to recall that the JPML consists of "seven circuit and district judges designated from time to time

was concerned with the emerging phenomenon of complex, multidistrict litigation. Its focus was upon creating and defining the functions of the JPML, not on redefining or circumscribing the traditional powers of the district court to which a case has been transferred. This is made reasonably clear by the House Report accompanying the proposed statute; that report stated that the bill "affects only the pretrial stages in multidistrict litigation. It would not affect the place of trial in any case or exclude the possibility of transfer under other Federal statutes." H. Rep. No. 1130, 90th Cong., 2d Sess. 3, *reprinted in* 1968 U.S.C.C.A.N. 1898, 1900. The report continued, *id.* at 1901-02:

> The subsection requires that transferred cases be remanded to the originating district at the close of coordinated pretrial proceedings. The bill does not therefore, include the trial of cases in the consolidated proceedings. The experience of the Coordinating Committee [for Multiple Litigation of the U.S. District Courts, established by the Judicial Conference of the United States] was limited to pretrial matters, and the committee consequently considers it desirable to keep this legislative proposal within the confines of that experience. . . . Of course, 28 U.S.C. 1404, providing for changes of venue generally, is available in those instances where transfer of a case for all purposes is desirable.

Thus, Congress, because of the nation's limited experience with multidistrict litigation, sought to design only the powers and duties of its new creation, the JPML.

by the Chief Justice of the United States." 28 U.S.C. § 1407(d). Respect for our brethren, and their longstanding practice, requires us to presume, absent compelling evidence to the contrary, that the rules promulgated pursuant to section 1407(f) are "not inconsistent with Acts of Congress." The alleged inconsistencies cited by the dissent are not sufficiently glaring to overcome that presumption. Hence, we conclude that Rule 14(b) is a valid exercise of the JPML's rulemaking authority, and that Judge Roll's actions in this case were fully justified.

Despite some uncertainty about this matter initially, the power of the transferee court to transfer a case to itself for trial has been reinforced by its consistent recognition in practice. Recourse to such sustained practice, particularly when approved by the JPML, is a legitimate aid to statutory interpretation. *See United States v. American Trucking Ass'n*, 310 U.S. 534, 549 (1940). In the case before us, this reading also strongly promotes judicial efficiency, which was a primary purpose of the legislation that created the JPML. *See* H. Rep. at 2, 1968 U.S.C.C.A.N. at 1899.

B. *The Procedures Available to Initiate Remand*

Additional insight into the apparently mandatory language of 28 U.S.C. § 1407(a) is provided by JPML Rule 14(c). That rule imposes the duty on the JPML to:

> consider remand of each transferred action . . . at or before the conclusion of coordinated or consolidated pretrial proceedings on (i) motion of any party, (ii) suggestion of the transferee district court, or (iii) the Panel's own initiative[.]

The absence of any such "motion" by a party, "suggestion" by the transferee court, or "initiative" of the Panel appears to leave the case in the care of the transferee court. Under these circumstances the transferee court must complete the litigation, even if it involves a trial, to avoid the absurdity of indefinitely suspended litigation, the pretrial proceedings of which have come to a close. Therefore, where the transferee court has declined to suggest a remand, the JPML has not ordered a remand on its own initiative, and the litigant has failed to seek a remand before the JPML, the transferee court is entitled to terminate the proceedings by conducting the trial. Besides setting out a procedure by which the JPML's duty to remand is triggered, this rule thus gives effect to the final clause of section 1407(a) by rendering its mandatory clause inoperative where the action has been terminated, even by trial.

That is the precise position in which the case rests in this appeal. The JPML's duty to remand was not activated. To repeat, the trigger to such activation was never pulled. Neither the district court nor the JPML sought to remand the case. Moreover, Lexecon, in lieu of moving the JPML for a remand, brought its motion before the district court, and now appeals to us for a remedy. Neither this procedure, nor its earlier petition for a writ of mandamus, amounts to a motion for remand brought before the JPML. Lexecon failed to seek succor from the one source that easily could have granted it if it so chose.[8] The district court, therefore, properly proceeded to conduct a trial on the single remaining, defamation claim, following the completion of the pretrial proceedings.

C. *Propriety of the Section 1404(a) Transfer*

Besides arguing that the district court's transfer to itself was without authority by virtue of section 1407, Lexecon also argues that it was improper under section 1404(a). Lexecon argues that any incremental gain in efficiency was at its expense, and that it was prejudiced by being dragged from Chicago, Illinois, to Arizona and forced to appear before Judge Roll, who was unfamiliar with MDL 834 and who improperly proceeded to "dismantle" its case. We disagree.

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[8] The dissent argues that Lexecon should not be faulted for its failure to move the JPML for remand, because Lexecon knew that the JPML would probably have denied the motion. Even assuming that Lexecon's prospects for success were slim, the fact remains that Rule 14(c) gave Lexecon the option to present its case to the JPML, including the arguments advanced by Judge Kozinski in his dissent. Lexecon chose not to pursue that option. In making this choice, Lexecon also knew, or should have known, that the option would expire, pursuant to Rule 14(b), if and when Judge Roll decided to transfer the case permanently to the District of Arizona.

Lexecon, to put it gently, was no stranger to the District of Arizona; its participation in MDL 834 precludes any such claim. Moreover, Judge Roll had become quite familiar with the case by the time of his decision to transfer the trial of the defamation claim to his own district. Finally, Judge Roll's dismissal of most of Lexecon's claims is not a ground for showing prejudice.

After a careful examination of the record and consideration of the arguments, we find no reason to question the district court's authority to try Lexecon's defamation claim in the District of Arizona, or the fairness of doing so.

III.

THE DENIAL OF INJUNCTIVE RELIEF SOUGHT BY MILBERG WEISS

No. 95-15759

After final judgment was entered in MDL 834 and Lexecon renewed its motion for a suggestion of remand, Milberg Weiss sought injunctive relief on the ground that the final judgment was res judicata as to Lexecon's claims. Milberg Weiss requested:

> (1) an order preliminarily enjoining plaintiffs . . . from prosecuting or otherwise pursuing against the Milberg Defendants, in any other judicial district or forum, any claims or other matters that were raised or could have been raised in the *Lincoln Savings* action . . .; and (2) an order permanently enjoining plaintiffs from prosecuting or otherwise pursuing those claims or other matters in any court or forum.

The district court concluded that Lexecon's claims were not precluded, and denied the motion.

We must uphold the denial of injunctive relief "unless the court incorrectly applied the law, relied on clearly erroneous factual findings, or otherwise abused its discretion." *Contract Serv. Network, Inc. v. Aubry*, 62 F.3d 294, 297 (9th Cir. 1995). We review de novo issues of

law underlying the denial, including the determination that Lexecon's claims were not barred by res judicata. *Id.* We now affirm.

A. *Mootness*

Initially, we confront the issue raised by Lexecon of the mootness of this appeal.[9] An appeal is moot "when events occur which prevent the appellate court from granting any effective relief even if the dispute is decided in favor of the appellant." *Holloway v. United States*, 789 F.2d 1372, 1373 (9th Cir. 1986) (internal quotation omitted). To the extent that Milberg Weiss sought to have the district court enjoin the litigation before the district court, which thereafter was completed favorably to Milberg Weiss by the entry of final judgment, its appeal from the court's failure to do so is moot. However, mootness does not extend to the efforts of Milberg Weiss to enjoin Lexecon from prosecuting its claims in other courts.

B. *Res Judicata*

Milberg Weiss supports its effort to enjoin Lexecon by arguing that the MDL 834 litigation foreclosed Lexecon's claims by reason of res judicata. This considerably overstates the preclusive effect of Judge Bilby's actions.

Under the doctrine of res judicata, "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). Judge Bilby's action pertaining to Lexecon was to dismiss the claims of the class against Lexecon without prejudice, in accordance with the parties' resolution. We have held that a dismissal

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[9] Lexecon also argues that the denial was not an appealable interlocutory order under 28 U.S.C. § 1292(a)(1). This is irrelevant given that final judgment has since been entered. *See In re Jenson*, 980 F.2d 1254, 1258 (9th Cir. 1992) (upon entry of final judgment, interlocutory orders become appealable). We decline to discuss Lexecon's several additional arguments concerning procedural irregularities in Milberg Weiss' appeal, which are without merit.

without prejudice lacks res judicata effect. *In re Corey*, 892 F.2d 829, 835 (9th Cir. 1989), *cert. denied*, 498 U.S. 815 (1990). Nor was Judge Bilby's subsequent order of December 31, 1992 (*see supra* n.2), a judgment on the merits of the claims against Lexecon. That order merely clarified the terms of the resolution, indeed emphasized that there had been no judgment on the merits of the claims against Lexecon.

Lexecon's reliance on *Western Sys., Inc. v. Ulloa*, 958 F.2d 864 (9th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993), and *Golden v. Pacific Maritime Ass'n*, 786 F.2d 1425 (9th Cir. 1986), is therefore misplaced. Those cases develop the relitigation exception to the Anti-Injunction Act, which allows a district court to enjoin litigation in other courts if such litigation is barred by res judicata.[10] Because Lexecon's claims are not barred by res judicata, those cases are not controlling.

C. *The Requirements for Injunctive Relief*

Even if Lexecon's claims were barred by res judicata, Milberg Weiss has still failed to show that the district court abused its discretion in declining to grant injunctive relief. To obtain a preliminary injunction, a party must show either "(1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) the existence of serious questions going to the merits and the balance of hardships tipping in the movant's favor." *MAI Sys. Corp. v. Peak Computers, Inc.*, 991 F.2d 511, 516 (9th Cir. 1993) (internal quotation omitted), *cert. dismissed*, 114 S. Ct. 671 (1994). At the time the Milberg Weiss' motion was filed, no such showing could be made. At that time, February 6, 1995, Milberg Weiss had also moved for a

[10] *See* 28 U.S.C. § 2283 ("A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."); *Western Sys.*, 958 F.2d at 871; *Golden*, 786 F.2d at 1427.

permanent transfer of this case to the Arizona District, and Judge Roll was poised to rule on Lexecon's motion to refer the case to the JPML for remand. His rulings thereafter were generally favorable to Milberg Weiss. Even had these rulings been adverse to Milberg Weiss, it could have appealed them to this court; therefore, it could not show either the possibility of irreparable injury or that the balance of hardships tipped in its favor. *See United States v. Rohm & Haas Co.*, 721 F. Supp. 666, 699 (D.N.J. 1989) (refusing to enjoin itself from entering proposed consent decree where appealability of the decree defeated any claim of irreparable harm). Nor was there any indication that Lexecon was likely to initiate an entirely new lawsuit on the same claims in a different forum. In short, Milberg Weiss failed to establish the conditions prerequisite to the issuance of the preliminary and permanent injunctions it sought.[11]

IV.

THE DISMISSAL OF THE MALICIOUS PROSECUTION AND ABUSE OF PROCESS CLAIMS
Nos. 95-16595 and 95-16403

We now turn to Lexecon's appeal from the dismissal by the district court under Fed. R. Civ. P. 12(b)(6) of its malicious prosecution and abuse of process claims. Our review of this dismissal is de novo, with all factual allegations taken as true and construed in the light most favorable to Lexecon. *See Gotcher v. Wood*, 66 F.3d 1097, 1099 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3605 (U.S. Feb. 26, 1996) (No. 95-1385). The district court's denial of Lexecon's motion for leave to amend its complaint is reviewed for an abuse of discretion. *United*

[11] Lexecon requests attorneys' fees for a frivolous appeal under Fed. R. App. P. 38. However, Rule 38, as amended effective December 1, 1994, requires that any such request be made by a separately filed motion. Without commenting on the merits of its request, we therefore deny Lexecon's request without prejudice to its filing a separate motion for attorneys' fees.

States v. County of San Diego, 53 F.3d 965, 969 n.6 (9th Cir.), *cert. denied*, 116 S. Ct. 183 (1995).

A. *Malicious Prosecution*

Under Arizona law, which the parties no longer dispute is the applicable law, the plaintiff must allege, and to prevail must ultimately prove, that the defendant "(1) instituted a civil action which was (2) motivated by malice, (3) begun without probable cause, (4) terminated in plaintiff's favor and (5) damaged plaintiff." *Bradshaw v. State Farm Mut. Auto Ins. Co.*, 758 P.2d 1313, 1319 (Ariz. 1988). Under Arizona law, probable cause requires that the plaintiff honestly believe in the lawsuit's possible merits and that the belief be objectively reasonable. *Id.* (citing Restatement (2d) of Torts § 675 comment c; Prosser & Keeton on the Law of Torts § 120, at 893 (5th ed. 1984).

There is no dispute here that Lexecon has properly alleged the first and last elements of the cause of action. Assuming, for purposes of argument only, that Lexecon has sufficiently alleged lack of probable cause and malice as well its claim fails nonethless. Judge Bilby's ruling in MDL 834 including his order of December 31, 1992 (*see supra* n.2) plainly indicated that the litigation was not "terminated" in Lexecon's favor.

Lexecon attempts to avoid this roadblock to its malicious prosecution claim by insisting that the district court erred in examining the MDL 834 record in ruling on Milberg Weiss' 12(b)(6) motion.[12] In general, material outside the pleadings cannot be considered in ruling on a motion to dismiss, unless the motion is treated as one for summary judgment and the parties are "given reasonable opportunity to present all material made pertinent to such

[12] *See, e.g., In re American Continental*, 845 F. Supp. at 1385 ("The record before this Court as recited in the *Shields* rulings is highly persuasive evidence that the case against Lexecon meets the probable cause threshold.").

a motion by Rule 56." Fed. R. Civ. P. 12(b); *Jacobsen v. AEG Capital Corp.*, 50 F.3d 1493, 1496 (9th Cir. 1995). Nonetheless, ample authority exists which recognizes that matters of public record, including court records in related or underlying cases which have a direct relation to the matters at issue, may be looked to when ruling on a 12(b)(6) motion to dismiss. *See Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir.), *cert. denied*, 116 S. Ct. 418 (1995); *Henson v. CSC Credit Serv.*, 29 F.3d 280, 284 (7th Cir. 1994); *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992).

It would be absurdly formal to hold that Judge Bilby's published opinion in MDL 834 and his December 31, 1992, order must be ignored in ruling on a motion to dismiss Lexecon's malicious prosecution claim. Only by alleging its own involvement as a defendant in MDL 834 was Lexecon able to frame its claim of malicious prosecution; why should the district court be limited by Lexecon's selective telling of a story that unfolded, and was duly recorded, in its sister court? Milberg Weiss, in its motion to dismiss, was entitled to refer to the record and outcome of the MDL litigation, and the district court was entitled to do the same in assessing the viability of Lexecon's claim. Formalism has its place, but that place is not here.

Lexecon argues further that the record in MDL 834 supports its contention that the litigation terminated in its favor. This is not true. "A termination does not satisfy the [favorable termination] element [of a malicious prosecution claim] if it is the result of compromise or settlement of the claim." *Frey v. Stoneman*, 722 P.2d 274, 277 (Ariz. 1986) (en banc). "If entry of summary judgment was merely the formal means of securing the parties' settlement benefits, the judgment cannot form the basis for a malicious prosecution action." *Id.* at 278-79 (internal quotation omitted). Here, the avoidance of the use of the term

"settlement" in favor of the alternative "resolution" does not alter that result.

Lexecon urges us to rely on *Bradshaw*, 758 P.2d at 1321, which held that a settlement may be a favorable termination depending on the surrounding facts. Lexecon argues that favorable termination is a question of fact that cannot be resolved on a 12(b)(6) motion. We disagree. In *Bradshaw*, the settlement terms called for the plaintiff to withdraw its action, pay the defendants $60,000, and stipulate to a dismissal with prejudice. Here, it was the defendant Lexecon that paid $700,000 in exchange for its dismissal from MDL 834. No additional factual development is necessary. The circumstances of this case do not indicate that the MDL 834 litigation against Lexecon terminated in its favor. It follows that Lexecon's malicious prosecution claim against both Milberg Weiss and Cotchett fails.

It also follows that we need not consider the argument of Milberg Weiss that the tort of malicious prosecution has been reshaped by First Amendment principles developed in the *Noerr-Pennington doctrine* [13] and *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 113 S. Ct. 1920, 1925 (1993) ("*PREI*"). Milberg Weiss argues that these decisions have raised the threshold for access to a malicious prosecution claim by requiring the plaintiff to show that the defendant's earlier suit was "objectively baseless" and one in which "no reasonable litigant could realistically expect success on the merits." [14] This formulation, if applied, would alter the

[13] *See California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

[14] The district court did dismiss the malicious prosecution claim on this ground, concluding that Lexecon could not show that the class' claims against it in MDL 834 were objectively baseless as required by *PREI*. However, we may affirm the dismissal on any basis supported by the record. *Pentax Corp. v. Myhra*, 72 F.3d 708, 710 (9th Cir. 1995).

meaning under Arizona law of the "probable cause" element, and to some degree the "malice" element, by eliminating the subjective, honest belief requirement.

Noerr-Pennington and *PREI* were federal antitrust cases that did not address the state law tort of malicious prosecution. In this circuit, the application of this line of cases to state law claims has been unpredictable. For example, the *PREI* objective baselessness standard was not applied to a National Labor Relations Board decision that a libel suit brought by an employer against a union was an unfair labor practice. *PREI* was said not to be on point. *Diamond Walnut Growers, Inc. v. NLRB*, 53 F.3d 1085, 1087-88 (9th Cir. 1995). On the other hand, a timber company counterclaim against an environmental organization for abuse of process, based on that organization's efforts to enjoin logging on the timber company's land, was required to meet the heightened pleading standard associated with *Noerr-Pennington*. *Oregon Natural Resources Council v. Mohla*, 944 F.2d 531, 533-35 (9th Cir. 1991).

The rationalizing principle of these cases is unclear, unless it rests on a judicial preference for certain types of litigation that appear to promote specifically recognized public interests. To encourage vigilent pursuit of these interests, it may be thought proper to protect them against threats of malicious prosecution by raising the barrier to access to that remedial tort action. Milberg Weiss argues, in substance if not in form, that the class action on behalf of Lincoln Savings investors easily conforms to that rationalization. Innocent investors in improperly operated savings and loan institutions and their legal representatives are as deserving of protection from the threat of malicious prosecution by those who have rendered financial services to such institutions as are plaintiffs in antitrust or environmental proceedings.

While there is a certain appeal in such an approach, we decline to rest our rejection of Lexecon's malicious prose-

cution on this ground.[16] We hold only that the MDL 834 litigation against Lexecon was not terminated in its favor. Therefore, under Arizona law, Lexecon has failed to state a claim of malicious prosecution.

B. *Abuse of Process*

Abuse of process is described by the Restatement (Second) of Torts § 682 (1977) as follows:

> One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process.

This definition is accepted by the Arizona courts. *See Nienstedt v. Wetzel*, 651 P.2d 876, 881 (Ariz. App. 1982); *Morn v. City of Phoenix*, 730 P.2d 873, 875 (Ariz. App. 1986). Plaintiff must show that defendants (1) committed a willful act in the use of judicial process

[16] There is now extensive case law on both sides of the question whether the *Noerr-Pennington* doctrine brings first amendment principles to bear on state law tort claims. *See, e.g., State of South Dakota v. Kansas City Southern Indus.*, 880 F.2d 40, 50-51 (8th Cir. 1989) (applying first amendment analysis to a state claim for tortious interference with contractual relations), *cert. denied*, 498 U.S. 1023 (1990); *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, 159-60 (3d Cir. 1988) (applying defamation and *Noerr-Pennington* analyses to tort claim based on defendants' actions in alerting authorities to plaintiff's violations of law); *Havoco of Am., Ltd. v. Hollobow*, 702 F.2d 643, 649 (7th Cir. 1983) (applying *Noerr-Pennington* and its sham litigation exception "to protect the First Amendment right to petition against claims of tortious interference with business relationships"); *Sierra Club v. Butz*, 349 F. Supp. 934, 938-39 (N.D. Cal. 1972) (applying first amendment analyses of *Noerr-Pennington* and defamation cases to state counterclaim for interference with advantageous relationship); *Florida Fern Growers, Inc. v. Concerned Citizens of Putnam County*, 616 So.2d 562, 569 (Fla. 1993) (declining to follow *Sierra Club v. Butz*). The time may come when this circuit must speak definitively on the question. However, this is not the right time, or the right case in which, to do so.

(2) for an improper ulterior purpose. *Nienstedt*, 651 P.2d at 881.

The gravamen of the tort is not "the wrongful procurement of legal process or the wrongful initiation of criminal or civil proceedings; it is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish." Restatement § 682, comment a; *see also Morn*, 730 P.2d at 875.

Accordingly, the task of this court is to determine whether the addition of Lexecon as a defendant in the MDL 834 litigation had as its primary purpose an objective for which that litigation was not intended. We hold that no such objective existed in MDL 834.

It is clear that the primary purpose of the MDL 834 litigation was to recover from the collapse of American Continental/Lincoln Savings on behalf of the investors therein such assets as was possible under the law. Lexecon, of course, does not deny that. Rather, its focus is upon its inclusion as a defendant. It asserts that class counsel's primary purpose in attempting to add Lexecon and Fischel as defendants was "(1) to extract false testimony implicating other *Shields* defendants, (2) prevent Arthur Young & Co. from using Lexecon as an expert in *Shields*, and (3) 'to make Lexecon . . . far less attractive to potential clients as expert witnesses.'" *In re American Continental*, 845 F. Supp. at 1382.

Lexecon alleges that after Milberg Weiss sought to file a fifth amended complaint adding both Lexecon and Fischel as defendants, it offered to dismiss the motion in exchange for "false testimony" against existing defendants. Lexecon refused, and leave to file this fifth amended complaint was subsequently denied. The alleged attempt to extract false testimony therefore never amounted to anything. Although process did later issue against Lexecon only as a result of defendants' successful motion to file their sixth amended complaint, the attempt to coerce false testimony was not repeated. Therefore, Lexecon

cannot show that the primary purpose behind Milberg Weiss' use of process was to coerce false testimony.

Lexecon also points to additional acts of Milberg Weiss that it claims amounted to an abuse of process. Some of these acts, such as the unsuccessful motion to file the fifth amended complaint, occurred "pre-process," and were therefore not actionable.[16] Others were collateral to the MDL 834 litigation, such as Milberg Weiss attorneys' use of that litigation to impeach Lexecon expert witnesses during cross-examination in separate and distinct litigation. Such cross-examination, so long as it conformed to the terms of the MDL 834 resolution, was not improper and therefore cannot form the basis of an abuse of process claim.

The acts alleged by Lexecon did not have as their *primary purpose* to inflict harm on Lexecon or Fischel. Nor did the addition of Lexecon as an MDL 834 defendant to assert that Lexecon bore some responsibility for those investors' losses constitute an abuse of process. Lexecon's abuse of process claim was therefore properly dismissed.[17]

V.

THE DISMISSAL OF MILBERG WEISS' COUNTERCLAIMS
No. 95-16754

The Milberg Weiss counterclaims alleged fraud, breach of contract, unjust enrichment, and promissory estoppel.

[16] Although Arizona courts define "process" broadly, *Nienstedt*, 651 P.2d at 880, we agree with the district court that it is not read so broadly as to include a failed attempt to sue in which process never issued.

[17] Examination of Lexecon's proposed second amended complaint shows that it merely reiterates the same claims in new language. Because leave to amend is inappropriate where the amendment dos not solve the legal deficiencies in the complaint, the district court did not abuse its discretion in denying Lexecon's motion for leave to amend. *See Jackson*, 902 F.3d at 1887.

The alleged source of these claims is the negotiations that led to the resolution of Lexecon's exposure to liability in MDL 834. We review their dismissal de novo. *Gotcher*, 66 F.3d at 1099; *Barrus v. Sylvania*, 55 F.3d 468, 469 (9th Cir. 1995).

First, Milberg Weiss alleged that while Lexecon said it was negotiating the "resolution" to avoid damaging cross-examination about MDL 834 in future cases, its true reason was to preserve its ability to sue class counsel for malicious prosecution by avoiding an unfavorable jury verdict. The district court properly dismissed this claim. While Milberg Weiss is a party in the litigation now before this court, it was not a party in the MDL 834 litigation; rather, it was a counsel to the class on whose behalf the proceedings against Lexecon were brought. As the district court put it: "Whatever harm resulting from the resolution was sustained by the class, not by class counsel." *In re American Continental*, 884 F. Supp. at 1397.

Second, Milberg Weiss argues that during the negotiations, Lexecon represented that it had no applicable insurance when in fact it did have such insurance, and that it relied on that representation in agreeing to the resolution. The district court properly ignored this claim because Milberg Weiss failed either to raise the issue in its pleadings, or to request leave to amend. *See* Fed. R. Civ. P. 15(a).

VI.

CONCLUSION

The judgments in Nos. 95-15759, 95-16403, 95-16595, and 95-16754 are affirmed.

KOZINSKI, Circuit Judge, dissenting.

Since the Judicial Panel on Multidistrict Litigation (JPML) was created in 1968, it has transferred 92,562 cases for consolidated pretrial proceedings. Only 3,508 of these—less than four percent—have been sent back for trial in the district where the complaint was filed. Administrative Office of the United States Courts, *Judicial Business of the United States Courts: 1995 Report of the Director* 32. Yet the statute which authorizes the JPML to transfer cases for coordinated or consolidated pretrial proceedings commands that "[e]ach action so transferred shall be remanded by the [JPML] at or before the conclusion of such pretrial proceedings to the district from which it was transferred . . . ." 28 U.S.C. § 1407(a). These numbers tell the story of a remarkable power grab by federal judges who have parlayed a narrow grant of authority to conduct consolidated discovery into a mechanism for systematically denying plaintiffs the right to trial in their forum of choice.

You don't have to stare very long at the statutory language and drafting history to realize this is not at all what Congress had in mind when it passed 28 U.S.C. § 1407. The language itself is clear as sunlight: A case may be transferred in order to take advantage of consolidated or coordinated discovery with other cases having a common factual nucleus. Coordinated or consolidated pretrial proceedings are to be handled by the transferee court but, if the case is to be tried, it must go back from whence it came.

The legislative history—if such limpid prose needs elucidation—is perfectly consistent with the text. Congress made a deliberate choice to authorize transfer for pretrial purposes only. "[T]he bill provides for the transfer of venue of an action for the limited purpose of conducting coordinated pretrial proceedings." H. Rep. No. 1130, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 1898, 1900. Congress thought about authorizing the JPML to transfer cases for all purposes but decided not to: "The bill does not, therefore, include the trial of cases in consolidated proceedings" *Id.* at 1901. Congress promised to return to the issue if it found the current grant of authority insufficient: "If . . . future experience justifies extending [section 1407] to include consolidation and coordination for trial purposes as well, only minor amendments to the present language of the bill will be necessary." *Id.* at 1902. Congress has never made those amendments.

Soon after the MDL process got underway, a peculiar thing started happening: Judges began to develop proprietary feelings toward the cases entrusted to them; they began using 28 U.S.C. § 1404(a), the venue transfer statute, to hold on to these cases for trial. Some judges worried that such transfers were not authorized: "I must recognize candidly," wrote Judge Bownes, then of the District of New Hampshire, "that there is nothing in the language of 28 U.S.C. § 1407(a) or 1404(a) which directly allows, or even suggests, that the transferee judge has the power to transfer cases to his district, or any district, for purposes of trial." *In re Air Crash Disaster Near Hanover, New Hampshire*, 342 F. Supp. 907, 909 (D.N.H. 1971). Such scruples were cast aside after the Second Circuit's opinion in *Pfizer, Inc.* v. *Lord*, 447 F.2d 122, 124-25 (2d Cir. 1971), a case that proved unusually influential, perhaps because retired Associate Justice Tom Clark was a member of the two-judge panel that authored the opinion.

Since *Pfizer*, this practice (known as "self-transfer") has become a routine aspect of the MDL process. The JPML has blessed self-transfer by its Rule 14(b), which provides that the Panel will not send a case back for trial if the district court handling pretrial matters transfers the case to itself, and by caselaw holding that the JPML will not even consider remanding so long as the district court is considering a self-transfer motion. *See in re CBS Color Tube Patent Litig.*, 342 F. Supp. 1403, 1405 (J.P.M.L.

1972) ("In view of the pendency of [a § 1404(a)] motion, we expressly refrain from granting this motion for remand and interfering in matters within the discretion of the transferee judge.").[1]

The majority thus has ample company in holding that a district judge to whom a case has been sent for pretrial under section 1407(a) may latch onto it by ordering a section 1404(a) self-transfer. *See* maj. op. at 15787. Every court that has examined the issue since *Pfizer* has held or assumed that such authority exists.[2] But a close

[1] It is for this reason that the majority's suggestion that Lexecon somehow waived its right to seek return of the case to the Northern District of Illinois is ill founded. *See* maj. op. at 15790-91. Under the Panel's rules and precedent, the JPML will not normally consider a transfer without a recommendation from the district judge. *See, e.g.*, J.P.M.L. R. Proc. 14(d) ("The Panel is reluctant to order remand absent a suggestion of remand from the transferee district court."); *In re A.H. Robins Co.*, 453 F. Supp. 108, 110 (J.P.M.L. 1978); *In re Holiday Magic Securities & Antitrust Litig.*, 433 F. Supp. 1125, 1126 (J.P.M.L. 1977) (both noting that, absent a suggestion from the transferee court, a party seeking remand from the JPML bears a heavy burden of persuasion). Lexecon—in compliance with this authority—petitioned the district court in August 1994 to refer the case back to the JPML because all possible coordinated discovery had concluded. The district court stayed consideration of this motion pending the end of discovery, Lexecon renewed its remand request at the close of discovery in November 1994. In December 1994, defendants moved for a section 1404(a) transfer, and in March 1995, the district court granted the transfer to itself, while simultaneously denying Lexecon's remand request.

Lexecon surely cannot be faulted for following the JPML rules by petitioning the district court twice for a referral and awaiting its ruling. And, by the time the court denied the motion, it had transferred the case to itself, which made the case off limits for further action by the Panel. *See* J.P.M.L. R. Proc. 14(b). The majority's charge that Lexecon—which went so far to seek a writ of mandamus from our court—"failed to seek succor" for its wrongs, maj. op. at 15792, is a sucker-punch.

[2] *See* maj. op. at 15787 & n.3 (citing *In re Food Lion, Inc., Fair Labor Standards Act Litig.*, 73 F.3d 528, 532 n.7 (4th Cir. 1996);

look at this caselaw reveals a remarkable lack of critical attention to this issue, with almost every court relying on *Pfizer* as the sum and substance of its analysis.[3] In fact, *Pfizer*, with its one page of analysis, is the only court

Washington Pub. Util. Group v. United States Dist. Ct., 843 F.2d 319, 326 (9th Cir. 1987); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1178 (D.C. Cir. 1987); *aff'd*, 490 U.S. 122 (1989); *Kohr v. Allegheny Airlines*, 504 F.2d 400, 402 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975); *In re Mahurkar Double Lumen Patent Litig.*, 750 F. Supp. 330, 332 (N.D. Ill. 1990); *In re Air Crash Disaster near Chicago*, 476 F. Supp. 445, 450 (J.P.M.L. 1979); *In re CBS Color Tube*, 342 F. Supp. at 1404-05).

[3] *See, e.g., Washington Pub. Util. Group*, 843 F.2d at 326; *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d at 1178 n.7; *In re Fine Paper Antitrust Litigation*, 685 F.2d at 820 n.7; *Eastern Air Lines, Inc. (in re Air Crash Disaster at Florida Everglades on Dec. 29, 1972)*, 549 F.2d at 1009 n.4; *In re Air Crash Disaster at Detroit Met. Airport on Aug. 16, 1987*, 737 F. Supp. 391, 394 n.4 (E.D. Mich. 1989); *In re Tax Refund Litig.*, 723 F. Supp. 922, 924 (E.D.N.Y. 1989); *In re Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo., on Nov. 15, 1987*, 720 F. Supp. 1455, 1458 (D. Colo. 1988); *In re Dow Co. "Sarabond Products" Liab. Litig.*, 664 F. Supp. 1403, 1403-04 (D. Colo. 1987); *In re Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975*, 479 F. Supp. 1118, 1122-23 (E.D.N.Y. 1978); *In re Air Crash Disaster Near Chicago*, 476 F. Supp. at 450; *In re Anthracite Coal Antitrust Litig.*, 436 F. Supp. 402, 403-04 (J.P.M.L. 1977); *In re Bristol Bay, Alaska, Salmon Fishery Antitrust Litig.*, 424 F. Supp. 504, 507 (J.P.M.L. 1976); *In re Bomb Disaster at Roseville, Cal., on April 28, 1973*, 399 F. Supp. 1400, 1403 (J.P.M.L. 1975); *In re Caesars Palace Securities Litig.*, 360 F. Supp. 366, 374 (S.D.N.Y. 1973); *In re Aircrash Near Duarte, Cal., on June 6, 1971*, 357 F. Supp. 1013, 1015 (C.D. Cal. 1973); *In re CBS Color Tube Patent Litig.*, 342 F. Supp. at 1405 n.2; *In re Air Crash Disaster at Huntington, W. Va., on Nov. 14, 1970*, 342 F. Supp. 1400, 1403 n.4 (J.P.M.L. 1972); *Greyhound Computer Corp. v. I.B.M. Corp.*, 342 F. Supp. 1143, 1145 (D. Minn. 1972); *In re Viatron Computer Systems Corp. Litig.*, 86 F.R.D. 431, 432-33 (D. Mass. 1980); *In re Master Key Antitrust Litig.*, 70 F.R.D. 23, 28 (D. Conn. 1975); *In re Penn Central Commercial Paper Litig.*, 62 F.R.D. 341, 345 (S.D.N.Y. 1974), *aff'd*, 515 F.2d 502 (2d Cir. 1975) (all relying on *Pfizer*).

of appeals opinion that seriously addresses the issue; most merely *refer* to the practice on the way to tackling other questions.[4] A lot of cases thus seem to sanction the practice, but not a single case after *Pfizer* has taken an independent look at the issue or dealt with the difficult questions it raises.

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[4] *In re Korean Air Lines Disaster of Sept. 1, 1893* dealt with whether the *Van Dusen* rule—that the state law applicable in the transferor forum attends the transfer—should apply to transferred federal claims. *See* 829 F.2d at 1174. Although Judge Douglas Ginsburg in his concurrence does mention the self-transfer practice, *see id.* at 1178 (D.H. Ginsburg, J., concurring), Judge Ruth Bader Ginsburg writing for the court describes section 1407(a) as "a statute authorizing transfers only for pretrial purposes." *Id.* at 1174. The Fourth Circuit also made passing reference to this practice in a footnote, *see In re Food Lion, Inc., Fair Labor Standards Act Litig.*, 73 F.3d at 532 n.7, on its way to addressing the issue in that case—when parties may appeal dispositions in the transferee court. Significantly, the Fourth Circuit noted, "Although Congress has not yet seen fit to allow the Panel or the transferee court to consolidate cases for trial, this is possibly a next step." *Id.* at 532. Our circuit and the Fifth have also noted the practice, but declined to address its legitimacy because the parties hadn't raised the issue. *See Washington Pub. Util. Group* v. *United States Dist. Ct.*, 843 F.2d 319 at 326 (the parties "disagree only as to whether the court properly applied [section 1404(a)]"; *Gordon* v. *Eastern Air Lines, Inc. (In re Air Crash Disaster at Florida Everglades on Dec. 29, 1972)*, 549 F.2d at 1009 n.4 ("The parties have not raised the question whether [a court can transfer an MDL case to itself;] therefore we do not reach it."). The Seventh Circuit has twice reported that the practice exists when recapping the factual history of cases that dealt with issues unrelated to the self-transfer question. *See Eckstein* v. *Balcor Film Investors*, 8 F.3d 1121 (7th Cir. 1993), *cert. denied*, 510 U.S. 1073 (1994); *Kohr*, 504 F.2d at 402.

Only the Third Circuit has seemingly blessed this practice. *See In re Fine Paper Antitrust Litigation*, 685 F.2d at 810. But the Third Circuit, in the single paragraph it devotes to the subject, doesn't even mention the possible conflict with section 1407(a), effectively assuming that self-transfer in the MDL context is appropriate. *See id.* at 819-20. Moreover, the Third Circuit's analysis consists primarily of a block quote from, you guessed it, *Pfizer*. *See id.* at 820 n.7.

While the federal courts have treated *Pfizer* as dispositive, commentators have been far more skeptical. With remarkable unanimity, they have questioned whether, and under what circumstances, district judges to whom cases are entrusted for purposes of discovery may hold on to them for trial. *See, e.g.*, 15 Charles A. Wright, et al., *Federal Practice and Procedure* § 3866, at 619 (2d ed. 1986) ("More questionable is the practice of the Section 1407 judge transferring the cases to himself for all purposes under Section 1404(a) of Title 28 . . . thereby giving the transferee court the ability to conduct the trial."); Robert H. Transgrud, *Joinder Alternatives in Mass Tort Litigation*, 70 Cornell L. Rev. 779, 809 (1985) ("[It] seems clear that the lower federal courts have done by judicial fiat what Congress refused to do by statute in 1969: amend section 1407 to allow transfers for trial."); Ross D. Cooper, *The Korean Air Disaster: Choice of Law in Federal Multidistrict Litigation*, 57 Geo. Wash. L. Rev. 1145, 1164 (1989) (similar); Mike Roberts, *Multidistrict Litigation and the Judicial Panel, Transfer and Tag-Along Orders Prior to a Determination of Remand: Procedural and Substantive Problem or Effective Judicial Public Policy?*, 23 Mem. St. U. L. Rev. 841, 866 (1993) ("It is a leap in logic to conclude that causes of action not terminated upon dispositive motions should be retained in the transferee court under the rubric of § 1404(a), when the statutory language of § 1407 explicitly directs remand to the transferor court."); *Report of the American Bar Association Section of Antitrust Law Task Force to Review the Supreme Court's Decision in* California v. ARC American Corp., 59 Antitrust L.J. 273, 302 (1990) ("[T]he use of Section 1404(a) transfers to consolidate multidistrict cases for trial is of dubious legal validity."); Blake M. Rhodes, Comment, *The Judicial Panel on Multidistrict Litigation: Time for Rethinking*, 140 U. Penn. L. Rev. 711, 734 (1991) ("[A] transferee court's use of § 1404(a) sets Congress's carefully crafted plan for multidistrict litigation on its head.");

Stanley J. Levy, *Complex Multidistrict Litigation and the Federal Courts*, 40 Fordham L. Rev. 41, 64 (1971) (the language and legislative history of section 1407(a) are so clear that it "originally appeared to be a futile exercise for a 1407 transferee court to rule on a 1404 transfer motion."); John F. Cooney, Comment, *The Experience of Transferee Courts Under the Multidistrict Litigation Act*, 39 U. Chi. L. Rev. 588, 606 (1972) ("[T]he apparently mandatory nature of the remand clause . . . implies that transferee courts lack this jurisdiction [to grant a section 1404 motion]."); George T. Conway III, Note, *The Consolidation of Multistate Litigation in State Courts*, 96 Yale L.J. 1099, 1102-03 (1987) ("[C]onsolidation for trial almost certainly defies both the letter of section 1407 and the intent of its drafters." (footnotes omitted)); Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 Harv. L. Rev. 1001, 1030-31 (1974) (legislative history of section 1407 emphasizes it would be used only for pretrial proceedings).

Research discloses not a single commentator who has examined the question and found statutory support for the position taken by the federal courts. Seldom have courts and commentators diverged so widely in their treatment of a legal issue.

Self-transfer under section 1404(a), in fact, raises three tough legal questions. The first is whether a district judge to whom a case is transferred for "coordinated or consolidated pretrial proceedings" under section 1407 is authorized to pass on a section 1404(a) change of venue motion. The answer is not self-evident. A venue transfer motion is, to be sure, a pretrial motion and therefore arguably within the authority of the transferee court conducting "coordinated or consolidated pretrial proceedings." But there must be *some* pretrial motions MDL courts are not authorized to rule upon because section 1407(a) does not transfer the case for the conduct

of all pretrial proceedings, only those that are "coordinated or consolidated." The statutory language seems to limit the MDL court's authority to motions that implicate more than a single case—something that venue transfer motions, which call for an "individualized, case-by-case consideration of convenience," do not. *Van Dusen* v. *Barrack*, 376 U.S. 612, 622 (1964); *see also Stewart Organization, Inc.* v. *Ricoh Corp.*, 487 U.S. 22, 29 (1988) ("A motion to transfer under § 1404(a) . . . calls on the district court to weigh in the balance a number of case-specific factors . . . .").[8]

The legislative history bears out this interpretation; Congress apparently understood the term "pretrial proceedings" to "generally involve deposition and discovery." H. Rep. No. 1130, *in* 1968 U.S.C.C.A.N. at 1900. A venue transfer motion is not a discovery motion. In fact, a proper application of section 1404(a) often depends on information obtained through discovery, so venue transfer motions are seldom considered before discovery closes. *See, e.g., In re Equity Funding Corp. of America Sec. Litig.*, 416 F. Supp. 161, 178-79 (C.D. Cal. 1976); Stanley A. Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 582 (1978); David F. Herr, *Multidistrict Litigation: Handling Cases Before the Judicial Panel on Multidistrict Litigation* 80 (1986); Robert J. Ward, *Multidistrict Litigation Procedures in the United States*, *in* The Trial Lawyer's Guide, at 249, 256 (John J. Kennelly ed. 1982) (all noting that transferee courts regularly postpone decisions on section 1404(a) motions until discovery is

[8] As I note below, shoehorning venue transfers into the concept of "coordinated or consolidated pretrial proceedings" requires a dramatic recalibration of the section 1404(a) calculus. *See* pp. 15818-23 *infra*. That MDL courts are unable to achieve consolidation for trial without twisting the standards of section 1404(a) beyond recognition ought to be a further clue that MDL courts have no business passing on venue transfer motions.

completed).[6] There is, therefore, a plausible case for holding that venue transfer motions are not among the powers of an MDL court.

And there is an excellent practical reason for so interpreting section 1407(a): If the MDL court grants a venue transfer motion, it cuts off the JPML's ability to comply with its statutory directive that it "shall" remand the case "to the district from which it was transferred." As one commentator noted, therefore, a change of venue motion "is of an entirely different nature than the powers" Congress intended to give MDL transferee courts. Trangsrud, 70 Cornell L. Rev. at 807.

It is true that an MDL court can dispose of the case by settlement or motion and thus prevent the JPML from remanding it.[7] But that is a possibility expressly accounted

[6] This was certainly the case here, as Judge Roll postponed deciding Lexecon's first change of venue motion (its initial remand request) until the end of discovery, at which time Milberg Weiss made its motion seeking self-transfer. Once discovery is completed, however, consolidated proceedings have ceased and there is no justification for allowing the transferee court to rule on the venue transfer motion; the motion could, just as easily, be ruled on by the originating district court after the case is remanded by the JPML.

Habitual procrastination of venue transfer decisions by MDL courts is ironic considering *Pfizer*'s big worry that, if the transferee court does not have authority to rule on a change of venue motion, no court would be able to do so during the course of pretrial proceedings. *See Pfizer*, 447 F.2d at 125 ("[T]o hold that the transferee court . . . has no section 1404(a) authority would mean that all proceedings on any section 1404(a) motion would have to be suspended for the entire period of pretrial. . . ."). This concern was especially misplaced because, so long as the case is partaking of "coordinated or consolidated pretrial proceedings" there is no need to transfer venue; indeed, any such transfer would defeat the purpose for which the case was consolidated in the first place.

[7] What kind of dispositive motions the MDL transferee court may rule on was once a subject of great controversy, but transferee courts, with the JPML's approval, now largely assume unlimited authority. *See* Levy, 40 Fordham L. Rev. at 60-61; *see also*

for in section 1407(a), which releases the JPML from its obligation to transfer the case back to its originating district if "it shall have been previously terminated." 28 U.S.C. § 1407(a). Had Congress also meant to release the JPML from its obligation in cases where venue is changed pursuant to section 1404(a), it could have said so. In fact, Congress said quite the opposite, at least in the legislative history of section 1407(a), where it repeatedly noted that the new statute "would not affect the place of trial in any case," H. Rep. No. 1130, *in* 1968 U.S.C.C.A.N. at 1900, and that "trial in the originating district is generally preferable from the standpoint of the parties and witnesses." *Id.* at 1901; *see* Roberts, 23 Mem. St. U. L. Rev. at 868 ("Clearly, the exact legislative history specifies that Congress never intended § 1407 by itself or . . . [through] tandem use with § 1404(a) . . . to alter the venue of ultimate trial.").[8]

Comment, *The Experience of Transferee Courts*, 89 U. Chi. L. Rev. at 588-89 ("After an initial period of hesitancy, transferee courts have steadily increased their control over pretrial proceedings far beyond the role envisioned by the drafters of the statute."). In fact, there is good reason to believe that Congress did not intend transferee courts to wield such unlimited authority. Had Congress wanted to authorize consolidated summary judgment procedures, it would have authorized the JPML to consolidate cases that presented common legal questions. Instead, Congress authorized consolidation only of cases that present "common questions of fact." Naturally, the JPML quickly ignored this limitation as well, and now routinely transfers cases where only common questions of law are at issue. *See, e.g.*, Levy, 40 Fordham L. Rev. at 48.

Whatever the *scope* of the MDL court's power to issue dispositive pre-trial orders, the *duration* of that power cannot extend beyond the time when "coordinated or consolidated pretrial proceedings" come to an end. At that point, there's no further justification for keeping the case in the MDL process and hence no authority for the MDL transferee court to enter further orders.

[8] The majority takes comfort from passages of legislative history that in fact support my view. *See* maj. op. at 15788-90. The first passage quoted by the majority clearly says that venue transfer under section 1407(a) is for the "limited purpose of conducting coordinated pretrial proceedings" and that "[i]t would not affect

It makes perfect sense for Congress to permit the transferee court to handle most pretrial legal issues—including some dispositive motions—and still insist that trial (if

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the place of trial in any case." H. Rep. No. 1130, *in* 1968 U.S.C.C.A.N. at 1900. Presumably, the majority relies on the portion of the quote which states that section 1407(a) would not "exclude the possibility of transfer under other Federal statutes." *Id.* I don't see how this helps the majority a bit. The passage merely affirms that, while the MDL statute would provide a special mechanism for transferring cases for pretrial purposes, all other venue transfer provisions remain in effect once the MDL procedure ends and the case is remanded. It surely couldn't have meant that transferee courts have the power to keep cases for trial when the rest of the quote says just the contrary.

The majority's second block quote is no more helpful. Presumably, again, the majority intends to emphasize the portion of the quote which allows, "Of course, 28 U.S.C. § 1404, providing for changes of venue generally, is available in those instances where transfer of a case for all purposes is desirable." *Id.* at 1902. But the majority omits, by way of an ellipsis, the two sentences preceding this quote, which help put it in perspective:

> Additionally, trial in the originating district is generally preferable from the standpoint of the parties and witnesses, and from the standpoint of the courts it may be impracticable to have all cases in mass litigation tried in one district. Additionally, the committee recognizes that in most cases there will be a need for local discovery proceedings to supplement coordinated discovery proceedings, and that consequently remand to the originating district for this purpose will be desirable.

Id. Nor does the majority quote the sentence that immediately succeeds its quote: "If proposed section 1407 should be enacted and future experience justifies extending it to include consolidation and coordination for trial purposes as well, only minor amendments to the present language of the bill will be necessary." *Id.* Sandwiched between these provisions, which make it clear that Congress was not intending to authorize MDL transferee courts to keep the cases sent to them for coordinated discovery, the sentence referring to section 1404 could only have been intended as another acknowledgment that the new MDL statute would not preclude normal venue tarnsfers by the court where the case was originally filed.

In any event, vague allusions in the committee reports cannot override the clear statutory language of section 1407, which effec-

there be one) be conducted in the district where the complaint was filed. Trial is a unique part of the litigation process in that it involves fact-finding, usually by a jury. Congress may have felt that federal judges are fungible for purposes of resolving legal questions, but that jurors—who reflect the sense of the community in adjudicating the rights and liabilities of their neighbors—are not. Congress also may have been willing to deny plaintiffs control over the pretrial forum, but thought it unfair to deny them control over the place of trial because jurors in the transferee district may have "background[s] . . . so different from that of jurors in [the transferor district] as to deprive plaintiffs of their constitutionally guaranteed right to a trial by a jury of their peers." *In re Air Crash Disaster near Hanover, New Hampshire*, 342 F. Supp. at 910.

Even assuming MDL transferee courts have authority to pass on ordinary venue motions, there is a second major question: May a court ever grant a motion to transfer venue *to itself*? Again, it helps to read the applicable statute, which in plain and simple terms provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any *other* district or division where it might have been brought." 28 U.S.C. § 1404(a) (emphasis added). I don't see how this language can be read to authorize a district court to transfer a case to itself. *See* Rhodes, 140

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tively forecloses venue transfer during the pendency of MDL procedures. This is precisely what one commentator who analyzed section 1407 before its enactment concluded: "[C]learly the [Coordinating C]ommittee's language [which was adopted into the House and Senate reports] is too ambiguous to provide any substantial justification for a court's reading section 1407 in a way opposed to its literal prohibition of transfers." Comment, *Consolidation of Pretrial Proceedings Under Proposed Section 1407 of the Judicial Code: Unanswered Questions of Transfer and Review*, 33 U. Chi. L. Rev. 558, 562 (1966). This commentator seems to have underestimated the creativity of federal judges.

U. Penn. L. Rev. at 740 ("A transferee court using § 1404(a) is not transferring a case to *another* district. It is simply proclaiming trial jurisdiction over the case." (emphasis in original)). Indeed, the drafters of section 1404(a) could not possibly have meant to authorize self-transfers because that section long predates section 1407; the possibility that a district court would be in a position to transfer a case to itself was not something anyone at the time could have anticipated.[9] Thus, this is not a case where the statutory language imperfectly reflects the intention of the drafters. The language of section 1404(a) precisely matches the understanding of the Congress that enacted it.

Are the federal courts nevertheless justified in tweaking section 1404(a) to make it yield up an authorization for self-transfer in the MDL context? Even under the best circumstances such judicial legerdemain would be awkward because it would require us to ignore the term "other" in section 1404(a). But these are not ideal circumstances because such manipulation creates a power

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[9] Defendants make a Rube Goldberg argument that Lexecon's case was, in fact, transferred to *another* district: Although transferred temporarily for pretrial purposes, the case was still technically pending in the Northern District of Illinois when the section 1404(a) transfer moved it to the District of Arizona, an "other district . . . where it might have been brought." *See* Br. of Milberg Defendants and of Cross-Appellant Milberg Weiss, at 25. Defendants seem to think that section 1404(a) merely requires that a case be transferred from one court to another.

This argument makes no linguistic sense because section 1404(a) provides that "*a district court* may transfer any civil action to any *other* district . . . ." 28 U.S.C. § 1404(a) (emphasis added). The phrase "any other district," which specifies the receiving court, stands in contrast to the earlier phrase "a district court," which refers to the court making the transfer. Or, to put it differently, the term "other district" must relate back to the term "district" within the same sentence. Thus, the court making the transfer cannot, under the terms of section 1404(a), be the same as the court receiving the transfer.

that Congress considered giving federal courts but expressly *rejected*. See p. 15805 *supra*.

This, then, is not a case where Congress passed two laws at different times and forgot to harmonize them. Congress, rather, made a deliberate choice to leave trial of cases subject to the MDL process in the district where they were filed. Given section 1407(a)'s explicit command that cases be remanded for trial in the district where they were filed, and legislative history making it clear that this was a deliberate choice, I don't' see how we can possibly fudge section 1404(a) to make it authorize self-transfer.

This question was not raised in *Pfizer* and no other federal court of appeals has ever considered it. The issue has been noted by commentators, and they have all concluded that self-transfer is not authorized by section 1404(a). *See, e.g., Rhodes*, 140 U. Penn. L. Rev. at 740-41 (arguing that using section 1404(a) in this way amounts to "creat[ing] a new 'venue' statute *sua sponte*.").

Even if we could overcome these first two hurdles, there is a third, equally daunting, one. Section 1404(a), at least as interpreted outside the MDL context, carries a strong presumption that plaintiff's choice of forum will not be disturbed. The presumption can be overcome only by a *compelling* showing that the convenience of parties and witnesses will be served by the transfer. *See* 15 Wright et al., § 3848, at 383. This interpretation of section 1404(a) is consistent with the traditional rule, which gave plaintiffs almost complete power to select the forum, *see Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508 (1947) ("[T]he plaintiff's choice of forum should rarely be disturbed."), and a judicial recognition that, by passing section 1404(a), Congress intended to disturb the plaintiff's choice of forum only for very strong reasons.[10]

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[10] The Supreme Court in *Norwood v. Kirkpatrick*, 349 U.S. 29 (1955), upheld a section 1404(a) transfer away from a plaintiff's

In the MDL context, the traditional forum deference afforded plaintiffs disappears entirely. It's as if MDL courts are applying a mutated version of section 1404(a), one where a plaintiff's right to pick its venue has devolved to the significance of a tailbone or an appendix. Thus, MDL courts seldom even consider the rights of plaintiffs to their chosen forums, much less give this factor controlling weight. *See, e.g.*, Transgrud, 70 Cornell L. Rev. at 809 ("When confronted with section 1404(a) motions, transferee courts have denied transfers only where those transfers would have put the parties in an improper venue or were requested prematurely."). Instead, concerns for judicial economy trump all others: "Since [a section 1404(a) transfer in the MDL context] involve[s] multiple cases, the rights, interests, and convenience of the individual parties [are] swept aside in the drive toward apparent judicial economy." Levy, 40 Fordham L. Rev. at 65; *see also* 15 Wright et al., § 3867, at 626 (when granting section 1404(a) transfers "notions of party and witness convenience, which typically are at the heart of transfer motions under Section 1404(a), may be subordinated to the type of judicial economy concerns that are central to Section 1407"); Richard A. Chesley & Kathleen W. Kolodgy, *Mass Exposure Torts: An Efficient Solution to a Complex Problem*, 54 U. Cin. L. Rev. 467, 525 (1985) ("[T]he efficiency standards of section 1407 many times overshadow the important individual concerns that the courts examine under section 1404.").

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home forum, which would have been impermissible under the traditional forum non conveniens doctrine. The Court reasoned that section 1404(a) was intended to broaden the power of courts to order venue transfers. "[N]evertheless it has been consistently held since that decision that plaintiff's choice of a forum will not be disturbed unless the balance of convenience weighs heavily in favor of defendant." *Franklin* v. *Blaylock*, 218 F. Supp. 261, 262 (S.D.N.Y. 1963), *aff'd sub nom. Blaylock* v. *McLean*, 319 F.2d 533 (2d ed. 1963) (citations omitted); *see also* Stephen C. Yeazell et al., *Civil Procedure* 193 (3d ed. 1992).

Section 1404(a), thus, has not only been conscripted by the federal courts to serve ends Congress never had in mind for it, it has also been stripped of the prudential constraints designed to protect plaintiff's choice of forum. What this means in practice is that self-transfers are not occasional, isolated events based on an unusually strong showing of judicial economy; they are the norm. The simple reality is that once a case is sucked into the MDL vortex, it seldom comes back. *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d at 1178 (D.H. Ginsburg, J., concurring) ("In practice, the vast majority of transferred cases are so resolved, and do not return to the transferor courts."); *In re New York City Municipal Secs. Litig.*, 572 F.2d 49, 51 (2d Cir. 1978) ("[H]istory has indicated that once the limited transfer has occurred, the transferor district is not likely to see the case again.").[11]

No case better illustrates the dangers of this practice than the one now before us. Applying normal 1404(a) standards, a venue transfer of this case from Chicago to Arizona would never have been granted; the convenience of the parties and witnesses would not have been served by such a transfer, much less clearly outweighed plaintiffs' right to choose their forum. Of the four witnesses who testified at trial, two were from Chicago, none from Arizona.[12] Plaintiffs were from Chicago, defendants from California but represented by a lawyer from Chicago. The *only* connection between this case and Arizona was the trial judge.

Nor was the "interest of justice" clearly served by transfer to Arizona for trial. The trial lasted only five days

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[11] I've found no case where an MDL court has been reversed for transferring a case to itself for trial.

[12] Of the 42 witnesses whose depositions had been noticed or taken at the time the request for remand was filed by Lexecon, only one was from Arizona. *See* Plaintiffs' Motion to Remand at 9. A very fine witness, to be sure, but still only one.

and turned on Illinois law. *See Lexecon* v. *Milberg Weiss*, 884 F. Supp. 1388 (D. Az. 1995) (applying Illinois law to Lexecon's defamation claim). Any advantage Judge Roll might have enjoyed in dealing with the facts was offset by the advantage a Chicago district judge would have had in instructing the jury as to Illinois law.[13]

No matter how you jiggle these factors, it's hard to come up with a plausible argument that trial in Arizona was more appropriate than trial in Chicago. Yet, as section 1404(a) is normally interpreted, a plaintiff's choice of forum can only be overcome if the transferee district is *clearly* more advantageous than the transferor district. Plaintiff's selection of its own home forum, when that forum is related to the subject matter of the suit, is entitled to even greater deference because both plaintiff and the community have an interest in resolving the controversy at home. *See, e.g., General Foam Plastics Corp.* v. *Kraemer Export Corp.*, 806 F. Supp. 88, 89 (E.D. Va. 1992); *Continental Airlines, Inc.* v. *American Airlines, Inc.*, 805 F. Supp. 1392, 1395-96 (S.D. Tex. 1992).[14] Instead, Lexecon was forced to trial in a forum

[13] This was not even a situation where the parties and witnesses were already going to trial on related claims so it would have been convenient to try this case at the same time. *Cf. In re Fine Paper*, 685 F.2d at 820 ("[P]laintiffs' convenience was outweighed by the comparative economy of trying one case in the Eastern District rather than several actions in the [plaintiffs'] home districts."). All other cases involving Lincoln Savings had long since been resolved.

[14] The rationale behind this rule is brought home by considering whether a Chicago or Arizona jury would better appreciate the following attempt by Lexecon's counsel to evoke sympathy for his client during summation:

> And as a kid, I used to go into Chicago and see these great skyscrapers, and through them you would see Lake Michigan glimmering in the distance. And about this time of the year, the pavement would shimmer with heat. About right now in Chicago, people in Lexecon are getting out of work and they are going to their cars and going to the subway, and they are thinking maybe about what is happening out here, and wondering: Will Lexecon continue to be the kind of fine organization that Dan Fischel built it to be? Will they have a future?

RT at 234-35 (July 31, 1995).

where there was much popular feeling against Lincoln Savings, Charles Keating and those (like plaintiffs) who were associated with them.[15] It was also a forum where a respected district judge felt so strongly that plaintiffs' claim was unjustified that he found it necessary to recuse himself. *See* maj. op. at 15781.[16]

[15] Not surprisingly, defense counsel peppered his arguments with references to Charles Keating's misdeeds and defendants' attempts to recover money for the victims, whom counsel described as "those retired people, the 23,000 people who got robbed, raped and peltered [sic] by Charles Keating." RT at 187 (July 31, 1991). Defense counsel also made much of the fact that, by settling the *Lincoln Savings* case, Lexecon avoided the verdict of an Arizona jury, and then ran off to Chicago and filed suit. *See id.* at 215 ("Now, as I said [before], if Lexecon wanted vindication, it could have taken its case to the jury. It did not. It paid $700,000. That is fine. But then it shouldn't have gone back to Chicago and thrown that $15 million brick at [defendants by filing suit]. It shouldn't have done that.").

[16] As the majority notes, Judge Bilby went so far as to amend the record in the earlier proceeding by entering an order explicating his view of the settlement and deriding Lexecon for having brought this lawsuit. Judge Bilby no doubt was sincere in his views but his order amounted to little more than testimony about his perception of the settlement. As this statement was not subject to the normal safeguards applicable to witnesses—such as cross-examination and impeachment—I find it troubling that the majority relies on it in characterizing Lexecon's case. *See* maj. op. at 15781-83.

Although Judge Roll had nothing to do with this order, he may have been influenced by his colleague's strong feelings, and thus "we [might] consider prior judicial experience in such a situation more a negative than an affirmative reason for transfer." *Codex Corp.* v. *Milgo Electronic Corp.*, 553 F.2d 735, 739 (1st Cir.), *cert. denied*, 434 U.S. 860 (1977). Moreover, defense counsel repeatedly referred to the sentence from Judge Bilby's order characterizing Lexecon's complaint as "a false description of the conditions under which [it] was dismissed from [the *Lincoln Savings*] case." De-

In ordering the self-transfer, the district court did not consider *any* of the traditional section 1404(a) factors. The court simply noted its familiarity with the case and concluded that it would be wasteful to have another judge conduct the trial. *See* Order, May 2, 1995. Such considerations of judicial economy—standing alone—have never before been sufficient to justify a section 1404(a) transfer. *See, e.g., Warrick* v. *General Electric Co.*, 70 F.3d 736, 740 (2d Cir. 1995) (per curiam) (judicial economy "is not alone sufficient" to justify a transfer); *Wash. Pub. Util. Group*, 843 F.2d at 326 ("[A] federal court may not order transfer under section 1404(a) solely for its convenience."); *Codex Corp.*, 553 F.2d at 739 ("[W]e have found no case where [the desire for consolidation] has carried the day against factors pointing in the other direction."); *Max Planck* v. *General Elec. Co.*, 858 F. Supp. 380, 382 (S.D.N.Y. 1994) (noting that court expertise with the subject matter of a case is an "irrelevant" consideration under section 1404(a)). If familiarity with the case in a five-day, four-witness, one-horse trial is sufficient to justify a section 1404(a) transfer, the case simply does not exist where judicial economy will not trump a plaintiff's right to a trial in his home district.

The majority points to JPML Rule 14(b) as authority for Judge Roll's action. *See* maj. op. at 15789-90 n. 7. But the rule governs only the internal procedures of the JPML, not the authority of the district court. *See* J.P.M.L. R. Proc. 14(b) ("In the event that the transferee judge so transfers an action under 28 U.S.C. § 1404(a) or 1406, no further action of the Panel shall be necessary to authorize further proceedings including trial."). Nor could it, since section 1407(f) only empowers the JPML

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fense counsel made sure the jury understood just who Judge Bilby was: "Judge Bilby learned of this lawsuit and Judge Bilby entered an order. The judge sitting across the street, the former Chief Judge of this district." RT at 193 (July 31, 1995).

"to prescribe rules for the conduct of *its* business." 28 U.S.C. § 1407(f) (emphasis added).[17]

But even if Rule 14(b) somehow purported to do what the majority ascribes to it, we would still have to consider what weight to attribute to it. JPML rules are not subject to the rigorous promulgation process of the Rules Enabling Act: They are not voted upon by the Judicial Conference of the United States; they are not adopted by the Supreme Court; they are not put before Congress for possible modification or rejection. *See* 28 U.S.C. §§ 2072-74. Nor do they have the dignity of executive branch regulations promulgated pursuant to a substantive grant of rule-making authority. *See Chevron U.S.A.* v. *NRDC*, 467 U.S. 837, 843-44 (1984). The JPML's rules have the force of local district court rules, which are authorized by a statute almost identical to section 1407(f). *See* 28 U.S.C. § 2071(a) ("[A]ll courts established by Act of Congress may from time to time prescribe rules for the conduct of their business."). As such, they are entitled to deference only to the extent they cover the JPML's business; they cannot broaden the transferee court's authority to act under section 1404(a). *See* 12 Wright et al., § 3153, at 228 ("[A] local rule is invalid if it makes 'basic procedural innovations' that should be left to the rulemaking power of the Supreme Court, surrounded, as that is, by statutory procedures that ensure mature consideration of informed opinion." (quoting

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[17] The JPML itself takes the position that it has no authority to tell MDL transferee courts what actions to take in the cases entrusted to them, including whether to grant section 1404(a) venue transfers. *See, e.g., In re Air Crash Disaster Near Chicago*, 476 F. Supp. at 450 ("[T]he Panel has neither the authority nor the desire to control decisions of the transferee judge made in the actual conduct of coordinated or consolidated pretrial proceedings[, including section 1404(a) determinations]."); *In re Westinghouse Electric Corp. Uranium Contract Litig.*, 436 F. Supp. 990, 996 (J.P.M.L. 1977) ("The Panel has neither the power nor the inclination to dictate in any way the manner in which judges process actions pending before them.").

Miner v. *Atlass*, 363 U.S. 641, 650 (1960)); *see also* Jack B. Weinstein, *Reform of the Federal Rule-making Process*, 63 A.B.A. J. 47, 47 (1977) ("There is no real opportunity even to challenge [local] rules in litigation since the judges who will decide the case are often the ones who adopted the rules.").

The majority also takes comfort from the fact that it reaches a result that is consistent with current practice—which must be the case given how seldom cases are returned for trial in the original district once they become ensnared in the MDL web. But a practice unsupported by thoughtful analysis, one that flies in the face of three clear statutory commands, surely is entitled to little weight. Moreover, this is not a case where we can read congressional silence as signifying approval of a particular statutory interpertation, a doctrine that is "at best treacherous," *Girouard* v. *United States*, 328 U.S. 61, 69 (1946), and at worst "a canard." *Johnson* v. *Transportation Agency*, 480 U.S. 616, 672 (Scalia, J., dissenting); *see Patterson* v. *McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989) (pointing out the "danger of placing undue reliance on the concept of congressional 'ratification' "). If acquiescence by silence can ever carry the day, it can do so only in areas such as the tax law where Congress exercises vigorous oversight or amends the statute frequently. Neither is the case here. Congress has amended the MDL statute only once in almost thirty years [18] and there is no indication that any of its committees exercises oversight in this area.[19] To the contrary,

[18] In 1976, Congress added section 1407(h) to provide for consolidation of cases filed under a newly added section 4C of the Clayton Act. *See* Pub. L. No. 94-435, tit. III, § 303, 1976 U.S.C.C.A.N. (90 Stat.) 1383, 1396.

[19] Congressional silence in the face of the self-transfer practice is especially problematic considering how inconspicuous the practice is. First, there are no accurate statistics on how many cases are subjected to self-transfer; neither the JPML nor the Administrative Office of the United States Courts nor the Federal Judicial Center keeps track. All we know is that lots of cases are subjected to the MDL process and very few ever get remanded. Second, the MDL statute continues to be portrayed as a mechanism affecting only pretrial, not trial, making "MDL appear to do less than it does." Judith Resnik, *From "Cases" to "Litigation"*, 54 Law & Contemp. Probs. 5, 47 (Summer 1991).

this is an area where Congress relies on the judiciary to point out problems and propose solutions, as it did when section 1407 was first passed.

The MDL statute, it will be recalled, was the brainchild of the federal judiciary: The Coordinating Committee for Multiple Litigation in the U.S. District Courts, established by the Judicial Conference of the United States, brought the problem to the attention of Congress, wrote the statute, lobbied for its adoption and explained to Congress exactly how it would work. *See* H.R. 1130, *in* 1968 U.S.C.C.A.N. at 1899. The Coordinating Committee eschewed the possibility of trial in the transferee court,[20] and never mentioned self-transfer as even a remote possibility.[21] Congress clearly understood the limited

[20] The Committee stated that "[t]he major innovation proposed is transfer solely for pre-trial purposes," which would achieve efficiency "without losing the benefits of local trials." *Report of the Co-Ordinating Committee on Multiple Litigation Recommending New Section 1407, Title 28* (Mar. 2, 1965), *reprinted in In re Plumbing Fixture Cases*, 298 F. Supp. 484, 498, 499 (J.P.M.L. 1968). As a result of the increased efficiency during pretrial, the Committee claimed that section 1407 would actually "*maximize* the litigant's traditional privileges of selecting where, when and how to enforce his substantive rights or assert his defenses." *Id.* (emphasis added).

[21] The Coordinating Committee explained that section 1407 "would not affect the place of trial in any case or exclude transfer under other statutes (e.g., Title 28, U.S.C. §§ 1404(a) and 1406(a)) prior to or at the conclusion of pre-trial proceedings." *Report of the Co-Ordinating Committee on Multiple Litigation Recommending New Section 1407, Title 28* (Mar. 2, 1965), 298 F. Supp. at 499. By using the phrase "prior to or at the conclusion of pre-trial proceedings," the Committee clearly indicated that a venue trans-

nature of the proposal and invited the federal judges to return if authorization for consolidated trials became necessary. *See id.* at 1902. The judges never bothered to return; instead, they seized the power by prescription.

* * * *

Despite the complicated nature of these proceedings, the question before us is rather straight-forward: Did the district court abuse its discretion in transferring the case to itself under section 1404(a)? It clearly did because MDL courts have no authority to pass on venue transfer motions, because section 1404(a) doesn't authorize self-transfer and because the factors favoring transfer are far too weak to overcome plaintiffs' right to a trial in their home district. We must therefore vacate that order and all subsequent orders entered by the district court, including, of course, the final judgment entered after trial.[22] The case should then be in a posture where plaintiffs would finally be free to petition the MDL panel for transfer back to the Northern District of Illinois. By approving this transfer, we complete the judicial arrogation of power in this area and put the last coffin nail into the experiment Congress started in 1968 when it gave the federal courts only a limited MDL authority. I will not be one of the pallbearers. I dissent.

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fer would only be available before or after, but not while, the case was in the MDL court. *See* Comment, *Consolidation of Pretrial Proceedings*, 83 U. Chi. L. Rev. at 562.

[22] In point of fact, at the time Lexecon made its first request for remand on August 5, 1994, all coordinated and/or consolidated pretrial proceedings—to the extent there ever were any—had come to an end. All orders entered by the district court after that date were beyond its authority as they did not relate to the limited purpose for which the case was transferred under section 1407(a). *See* note 7 *supra*. These orders, particularly the summary judgment granted on April 24, 1995, should be vacated.

APPENDIX B

[Filed Aug. 7, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MDL Docket No. 834
No. CIV-93-1087-PHX (JMR)
Judge John M. Roll

IN RE AMERICAN CONTINENTAL CORPORATION/
LINCOLN SAVINGS & LOAN SECURITIES LITIGATION.

LEXECON INC.,
Plaintiff,

v.

MILBERG WEISS BERSHAD HYNES
& LERACH and KEVIN P. RODDY,
Defendants.

JUDGMENT IN A CIVIL CASE

XXX *JURY VERDICT.* This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

DECISION BY THE COURT. This action came under consideration before the Court. The issues have been considered and a decision has been rendered.

THE JURY FINDS IN FAVOR OF DEFENDANTS KEVIN P. RODDY AND MILBERG

WEISS BERSHAD HYNES & LERACH AND AGAINST PLAINTIFF LEXECON INC.

IT IS HEREBY ORDERED THAT JUDGMENT IS ENTERED IN ACCORDANCE WITH THE JURY VERDICT AND THAT THIS CASE IS DISMISSED.

RICHARD H. WEARE
Clerk

/s/ M. HARDEMAN
By Deputy Clerk
Marilyn Hardeman

Aug. 1, 1995

APPENDIX C

[Filed Jul. 21, 1995]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-70380
DC# CV-93-1087-PHX

LEXECON INC., *et al.*,
Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA,
Respondent,

and

MILBERG WEISS BERSHAD HYNES & LERACH, *et al.*,
Real Parties in Interest.

Petition for Writ of Mandamus
in the United States District Court
for the District of Arizona
John M. Roll, District Judge, Presiding

Argued and Submitted July 17, 1995
San Francisco, California

Before: FLETCHER, KOZINSKI and THOMPSON, Circuit Judges

MEMORANDUM*

In this petition for writ of mandamus, petitioners ask this court to: (1) vacate the district court's order which permanently transferred the above-entitled case to the District of Arizona pursuant to 28 U.S.C. § 1404(a); and (2) direct the district court to remand this case to the Northern District of Illinois pursuant to 28 U.S.C. § 1407. Petitioners also have filed a motion to stay the district court proceedings pending our decision. We deny the petition for writ of mandamus and deny the motion to stay as moot.

This court considers five factors in deciding whether a case is appropriate for mandamus relief: (1) whether the petitioner has no other adequate means, such as a direct appeal, to attain the relief desired; (2) whether the petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district court's order is an oft-repeated error; and (5) whether the district court's order raises new and important problems, or issues of first impression. *Bauman v. United States Dist. Court,* 557 F.2d 650, 653 (9th Cir. 1977). The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. *Wash. Pub. Util. Group v. U.S. Dist. Court,* 843 F.2d 319, 323 (9th Cir. 1987) ("WPPSS").

Here, as to the first factor, we are not satisfied that petitioners cannot attain the relief they request on direct appeal. The case is scheduled for trial on July 25, 1995. The trial, we understand, will be of short duration. The

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

transfer order can be appealed immediately along with other issues in the event the petitioners lose on the merits.

As to the second factor, petitioners contend the expense and inconvenience of what may be an unnecessary trial in the District of Arizona meets the second *Bauman* factor. They rely on *Sunshine Beauty Supplies* for the proposition that "the prejudice that results from an erroneous transfer order is of a type not correctable on appeal." *Sunshine Beauty Supplies v. U.S. Dist. Court,* 872 F.2d 310, 311 (9th Cir. 1989).

Petitioners' reliance on *Sunshine Beauty Supplies* is misplaced. There, the district court's transfer order would have required the plaintiff, who sought confirmation of an arbitration award in the district court in California, to travel to Texas to present its claim. Here, the parties are already before the federal district court in Arizona and have been for more than a year as they pursued discovery. The district court's order transferring the present case to itself for trial simply leaves the parties where they are. It does not force them to go to another district to try their case. Petitioners have not shown how they would be prejudiced by conducting what is scheduled to be a four-day trial in the district where they have been litigating for more than a year. *Cf. Varsic v. U.S. Dist. Ct.,* 607 F.2d 245, 252 (9th Cir. 1979) (substantial prejudice shown by plaintiff who would have had to travel some 3,000 miles to prosecute his action).

As to the third factor, we cannot say the district court's order transferring this case to itself for trial is clearly erroneous as a matter of law. A question of law is clearly erroneous if we are left with the definite and firm conviction that a mistake has been made. *United States v. Harper,* 729 F.2d 1216, 1222 (9th Cir. 1984). Here, petitioners contend the district court clearly erred by: (1) ignoring 28 U.S.C. § 1407, which instructs that the case be remanded for trial to the Northern District of

Illinois; and (2) transferring the case to itself under 28 U.S.C. § 1404(a).

We are not prepared to say that these contentions lack merit. However, despite what appears to be a clear statutory mandate, Multidistrict Litigation Rule 14(b) explicitly authorizes a transferee court to transfer the action to itself for trial pursuant to 28 U.S.C. § 1404(a) and the district court's decision is supported by case law. *See In Re Fine Paper Antitrust Litigation*, 685 F.2d 810, 820 (3rd Cir. 1982); *Pfizer v. Lord*, 447 F.2d 122, 125 (2d Cir. 1971); *see also WPPS* at 326 (transferee court has authority to sua sponte change venue). Further, petitioners have cited no case law to the contrary. Although upon review on direct appeal, we might well reach the opposite result, it is not possible for us to hold at this juncture that the district court's decision is clearly erroneous. *See Harper*, 729 F.2d at 1222. In any direct appeal the merits panel is free to examine all of the issues.

Although there may be oft-repeated error in other circuits, petitioners do not demonstrate how the fourth *Bauman* factor applies in this circuit. While the fifth factor may be met, we conclude that in this case resolution is available on direct appeal in a setting more conducive to adequate briefing and full deliberation. We see no emergent need for instant resolution.

Accordingly, the petition for writ of mandamus is DENIED. The motion to stay is denied as moot.

Kozinski, Circuit Judge, dissenting.

I would grant the writ to correct an egregious, oft-repeated error in the interpretation of 28 U.S.C. §§ 1404, 1407. Section 1407(a) authorizes the Multidistrict Panel to transfer cases for *pretrial* proceedings; after those proceedings are completed, and before trial, "[e]ach action so transferred *shall* be remanded by the panel." (emphasis added). It's hard to imagine a clearer statutory command, or one more widely ignored.

Starting with the Second Circuit's summary treatment in *Pfizer, Inc.* v. *Lord*, 447 F.2d 122, 124-25 (2d Cir. 1971), the federal courts have simply disregarded the statutory mandate *Pfizer* and a few subsequent cases have recognized they weren't following the statute, but justified their departure on grounds of policy or convenience. *See, eg., Pfizer*, 447 F.2d at 124-25 (rejecting as absurd a result that would delay section 1404(a) motions until after remand); *In re Air Crash Disaster Near Hanover, New Hampshire*, 342 F. Supp. 907, 909 (D.N.H. 1971) ("I must recognize candidly that there is nothing in the language of 28 U.S.C. § 1407(a) or 1404(a) which directly allows, or even suggests, that the transferee judge has the power to transfer cases to his district, or any district, for purposes of trial."). Most have simply taken their place at the head of an ever-growing string cite. The Multidistrict Panel went so far as to enshrine this unlawful practice into one of its rules, J.P.M.L.R.P. 14(b), and the Federal Judicial Center's *Manual for Complex Litigation (Third)* § 21.61 (1995), mentions it as a standard option. Seldom have so many been so consistently wrong.

The time has come to put a stop to this illicit practice by saying loud and clear that the Multidistrict Panel assigns cases only for pretrial proceedings; it doesn't grant proprietary rights in them. Indeed, I consider it unseemly for district judges who have been entrusted cases for limited purposes to routinely glom onto them. It's true that section 1407(a) gives transferee courts power over pretrial proceedings and venue transfer motions under section 1404(a) fall under that general heading. But this presents no irreconcilable conflict between sections 1404 and 1407: Pretrial proceedings under 1407 are obviously limited to those raising issues common to other cases, primarily discovery; that's the entire point of the multi-

district process. Under section 1407, the Multidistrict Panel retains the power to transfer the case and that power is carefully limited to accomplish the statute's purpose. This precludes use of the general transfer section by district judges to subvert the panel's responsibility.

Section 1407 reflects an important policy choice: Cases may be transferred to remote locations, but only for the duration of pretrial procedures. When it comes to conducting a trial (and resolving other dispositive matters) plaintiffs retain their ancient right to select the forum. Had Congress meant to empower the Multidistrict Panel to reassign cases for resolution of dispositive matters, including trial, it would have drafted the statute much differently. This is a policy choice federal judges are bound to respect, regardless of their views of efficiency or their fondness for particular cases.

Petitioners here were dragged hundreds of miles from their home district in Illinois to appear before a judge in Arizona who had no familiarity with the case or expertise in the issues; they participated in no common proceedings; they benefitted from no coordinated discovery; and they are now forced to go to trial in the remote district because, having needlessly been required to spend so much time in Arizona, it makes no sense to send them back. There's a warped logic to each step in this process, but the net effect is to undercut the important policy of section 1407. That the matter comes up on appeal so seldom —and will likely be washed out by trial or settlement before it can come to us again in this case—makes it the more urgent for us to resolve the issue and put an end to an illicit practice that has developed willy-nilly during the last quarter century. If not we, who? If not now, when?

APPENDIX D

[Filed May 5, 1995]

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

(CIVIL ORDER—GENERAL)

MDL 834 PHX RMB
Civil Case No. CV93-1087 PHX JMR

LEXECON

v.

MILBERG WEISS

Date: May 2, 1995

HONORABLE JOHN M. ROLL

Pending before the Court are cross-motions relating to venue, Milberg Weiss' motion for sanctions, and plaintiffs' motion to strike amended interrogatory response.

As to venue, plaintiffs argue that the MDL statute, 28 U.S.C. § 1407, requires this Court to transfer this case to the MDL panel so that it may return to the Northern District of Illinois. Plaintiffs admit that no court has so construed that statute. Substantial authority exists to the contrary. Multidistrict Litigation Rule 14(b); *In re Fine Paper Antitrust Litig.*, 685 F.2d 810 (3d Cir. 1982); *In re Air Crash Disaster Near Chicago, Illinois*, 476 F. Supp. 445 (J.P.M.L. 1979). Under this authority, the Court concludes that it has the power to transfer this action to itself or any other court. 28 U.S.C. §§ 1404 and 1406.

Under § 1404(a)'s balancing test, the Court finds that the interest of justice is best served by transferring this action to itself. In light of the one claim which remains in

this case for trial, judicial economy heavily weighs in favor of this Court continuing to exercise jurisdiction over this case.

On the remaining motions in this matter, the Court finds that plaintiffs' motion to strike is moot and concludes that defendant's motion is not properly before the Court because Local Rule 1.10(j) requires that counsel first confer in an effort to resolve the dispute prior to seeking the Court's intervention. Furthermore, as to the merits, the imposition of sanctions is unwarranted.

Therefore, IT IS HEREBY ORDERED that plaintiffs' motion to refer the case back to the Multidistrict Litigation Panel IS DENIED and Milberg Weiss' motion to transfer the case to this Court IS GRANTED.

IT IS FURTHER ORDERED that plaintiffs' motion to strike amended interrogatory response IS DENIED as moot.

IT IS FURTHER ORDERED that Milberg Weiss' motion for sanctions IS DENIED.

IT IS FURTHER ORDERED that a pretrial conference is hereby set in this matter for Tuesday, May 30, 1995 at 4:00 p.m. Counsel are directed to submit a joint proposed pretrial order by May 22, 1995, in accordance with the form attached.

/s/ John M. Roll
JOHN M. ROLL
United States District Judge

[Filed Jan. 7, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MDL Docket No. 834
CV 93-1087 PHX JMR

IN RE AMERICAN CONTINENTAL/LINCOLN SAVINGS & LOAN SECURITIES LITIGATION.

LEXECON INC. and DANIEL R. FISCHEL,
Plaintiffs,

vs.

MILBERG WEISS BERSHAD HYNES & LERACH, *et al.*,
Defendants.

ORDER

The Court having previously granted summary judgment in favor of defendants Cotchett, Illston & Pitre, Joseph Cotchett, and Susan Illston, and there being no just reason for delay of entry of a final judgment in their favor pursuant to Rule 54(b), Federal Rules of Civil Procedure.

IT IS HEREBY ORDERED that plaintiffs' claims against said defendants ARE DISMISSED WITH PREJUDICE.

Dated this 2nd day of June, 1995.

/s/ John M. Roll
JOHN M. ROLL
United States District Judge

APPENDIX E

[Filed Apr. 24, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MDL Docket No. 834
CV 93-1087 PHX JMR

IN RE AMERICAN CONTINENTAL/LINCOLN SAVINGS & LOAN SECURITIES LITIGATION.

LEXECON, INC. and DANIEL R. FISCHEL,
Plaintiffs,

vs.

MILBERG WEISS BERSHAD HYNES & LERACH, a partnership; COTCHETT, ILLSTON & PITRE, a partnership; and PATRICK COUGHLIN, WILLIAM S. LERACH, KEVIN P. RODDY, LEONARD B. SIMON, MELVYN I. WEISS, PATRICIA HYNES, MICHAEL C. SPENCER, STEPHEN STEINBERG, JOSEPH COTCHETT, and SUSAN ILLSTON, individually,
Defendants.

Pending before the Court are defendants' motions for summary judgment in connection with the remaining claims of plaintiffs and plaintiffs' motion to dismiss the Milberg Weiss defendants' counterclaims. Defendants are the law firm of Milberg, Weiss, Bershad, Hynes and Lerach, and certain individually named firm members ("Milberg Weiss"), and the law firm of Cotchett, Illston and Pitre and partners Joseph Cotchett and Susan Illston ("Cotchett, Illston and Pitre").

Factual and Procedural Background

The factual background concerning this matter is set forth in a previous Order issued by this Court. *In re American Continental Corp./Lincoln S&L Sec. Lit.: Lexecon, Inc. v. Milberg Weiss,* 845 F. Supp. 1377 (D.Ariz. 1993). That Order resulted in the dismissal of malicious prosecution and abuse of process claims of plaintiffs and the dismissal of most defamation claims. Still pending are (1) plaintiffs' defamation claim against all defendants arising from the distribution of the proposed Sixth Amendment Complaint; (2) plaintiffs' defamation claim against the Milberg Weiss defendants based upon the Roddy letter to the *National Law Journal*; (3) plaintiffs' tortious interference and commercial disparagement claims against the Milberg Weiss defendants; and (4) the Milberg Weiss defendants' counterclaims. This Order addresses the defendants' motions for summary judgment as to all of these remaining claims of plaintiffs and plaintiffs' motion to dismiss the Milberg Weiss defendants' counterclaims.

Sixth Amended Complaint

The Court previously denied defendants' motion to dismiss plaintiffs' defamation claim arising from Milberg Weiss' dissemination of the proposed Sixth Amended Complaint.

Facts

On March 26, 1990, defendants disseminated to the service list a proposed Fifth Amended Complaint in the *Lincoln Savings* litigation, adding Lexecon and Daniel Fischel as defendants. The proposed complaint was accompanied by a motion for leave to file. The Hon. Richard M. Bilby, the judge to whom the *Lincoln Savings* case was assigned, denied without prejudice the motion to file that complaint as it related to Lexecon and Fischel.

Thereafter, the decision was made by class counsel to again attempt to sue Lexecon and/or Daniel Fischel. The

task of writing that portion of the proposed Sixth Amended Complaint relating to Lexecon fell to Milberg Weiss partner Kevin Roddy. Soliciting input from Milberg Weiss partners Leonard Simon and William Lerach and co-lead counsel Joseph Cotchett of the law firm of Cotchett, Illston and Pitre, Roddy's complaint named both Lexecon and Fischel as defendants. On Friday, December 14, 1990, Roddy, working alone in Milberg Weiss' Los Angeles office, determined that the complaint was finalized and sent it to all the attorneys appearing on the MDL 834 service list, pursuant to Judge Bilby's management order.[1] This complaint totalled 231 pages. Roddy also gave instructions for the Sixth Amended Complaint to be filed with the District Court of Arizona.

When Simon, the class counsel responsible for that portion of the case dealing with Lexecon, learned of Roddy's dissemination of the proposed Sixth Amended Complaint, he notified Arizona counsel not to file the documents. On December 18, 1990, only four days after Roddy had disseminated the proposed complaint, a revised Sixth Amended Complaint which named Lexecon as a defendant but deleted Fischel as a party was filed with the court and disseminated to the service list.[2]

Discussion

Plaintiffs maintain that dissemination of the proposed Sixth Amended Complaint by Roddy on December 14, 1990, listing Fischel as a defendant, constitutes an intentional and deliberate defamatory act by defendants in furtherance of a conspiracy to destroy them. Because an attorney from the firm of Cotchett, Illston and Pitre signed the aborted Roddy complaint and that firm was co-lead counsel with Milberg Weiss in *Lincoln Savings*, Cotchett, Illston and Pitre are also alleged to have been participants in this conspiracy.

[1] Although one could infer to the contrary from Lexecon's complaint, it is now clear that Roddy only disseminated the Sixth Amended Complaint to the service list. While that list is admittedly a lengthy one (101 attorneys), Lexecon does not allege that the complaint was disseminated to disinterested third parties.

[2] On December 17, 1990 Simon sent a letter to the service list instructing recipients to disregard the previous motion. This letter did not specifically state that the difference between the two complaints was that Daniel Fischel was not named as a defendant in the latter.

In support of their allegations, plaintiffs point to a disturbing history of acrimonious statements made by members of the Milberg Weiss firm concerning Fischel. These statements are set forth in detail in the discussion below concerning plaintiffs' tortious interference and commercial disparagement claims.

The December 14, 1990 proposed Sixth Amended Complaint must be considered in context. Plaintiffs maintain that inclusion of Fischel as a defendant in that complaint was intended to defame. The Fifth Amended Complaint, however, also listed Fischel as a defendant and identified the same alleged conduct by Fischel. Furthermore, the revised Sixth Amended Complaint that was ultimately filed on December 18, 1990, contained virtually all of the allegations against Fischel set forth in the aborted Sixth Amended Complaint. The only significant difference between the proposed Sixth Amended Complaint circulated by Roddy on December 14, 1990, and the Sixth Amended Complaint that was filed December 18, 1990, is that Fischel is not named as a defendant in the latter complaint.[3] Roddy and Simon have sworn that the

[3] The Sixth Amended Complaint, attached as an exhibit to the December 18, 1990 motion for leave to file an amended complaint, differed from the Roddy complaint in the following respects: (1) Fischel was deleted from the caption; (2) twelve references to "defendants Lexecon and Fischel" in the body of the complaint were changed, nine times to "defendant Lexecon and Fischel" and three times to "defendant Lexecon"; and (3) six references to "defendant Fischel" were changed, five times to "Fischel" and the sixth reference was deleted. However, it still incorrectly contained three references to "defendants Lexecon and Fischel" and one reference to

December 14, 1990 dissemination of the Sixth Amended Complaint by Roddy was simply a mistake. No direct evidence controverts this testimony.[4]

To establish defamation based upon Roddy's dissemination of the proposed Sixth Amended Complaint, plaintiffs must show that the complaint was false and defamatory and that defendant Roddy acted with knowledge of the falsity of the allegations or with reckless disregard for the truth or falsity thereof. *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964). Furthermore, because Fischel is a "limited-purpose public figure,"[5] were this claim to proceed to trial, plaintiffs would have the burden of proving this last element by clear and convincing evidence.[6] *Id.*, 376 U.S. at 285-86.

Summary judgment is appropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). No reasonable jury could find that defendants intentionally disseminated a complaint and withdrew it four days later in order to harm plaintiff Daniel Fischel.[7] Because the evidence

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"defendant Fischel." When Judge Bilby granted the motion for leave to file the Sixth Amended Complaint on February 15, 1991, the Sixth Amended Complaint which was filed that day corrected the erroneous references to Fischel.

[4] Plaintiffs' only evidence countering this testimony is the inferences to be drawn from the long-running feud between plaintiffs and defendants.

[5] The distinction between a "limited-purpose public figure" and a "public figure" is discussed in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974). Here, because all references to Fischel are directly related to his public figure status as an expert in the securities field, he is treated as a public figure.

[6] The Ninth Circuit has recently clarified that this is the only element of the defamation action which must meet this heightened standard of proof. *Rattray v. City of National City*, No. 92-55791 (9th Cir. filed Oct. 7, 1994, amended March 21, 1995).

[7] The Court also finds that the record, after full and thorough discovery, lacks sufficient evidence to support an alternative finding of recklessness on the part of Roddy, Simon, or other Milberg Weiss defendants.

against the Cotchett, Illston and Pitre defendants is far less persuasive than that against the Milberg Weiss defendants, their motion for summary judgment must also be granted.

The Kevin Roddy Letter to the National Law Journal

This Court previously denied defendants' motion to dismiss defamation claims based upon the letter submitted by Kevin Roddy to the *National Law Journal*.

Facts

On December 14, 1992, the *National Law Journal* printed a story concerning the *Lincoln Savings* litigation. Randall Samborn, *Firms Sued in Wake of Lincoln S&L Case*, National Law Journal, December 14, 1992 at 2. There is no evidence that Lexecon or Daniel Fischel were responsible for the publication of this article.

In response to that article, Kevin Roddy wrote a letter to the *National Law Journal*. Kevin P. Roddy, *Defendants Tell Their Side of Lexecon Suit*, National Law Journal, March 8, 1993 at 16.

Discussion

Plaintiffs argue that Roddy's letter was false and defamatory because the letter stated: (1) Judge Bilby, in a published opinion, had detailed Lexecon's "wrongful activities on behalf of convicted felon Charles H. Keating, Jr.'s American Continental Corporation and Lincoln Savings and Loan in fraudulent dealings with federal regulators"; (2) Lexecon had "settled" with plaintiffs; and (3) "to date, Lexecon has paid Plaintiffs Litigation Group more than $700,000 as part of that settlement."

Defendants first maintain that the letter is not actionable because it is true. As to the first matter, relating to the characterization of Judge Bilby's published opinion, the Court finds otherwise. *In re American Continental Corp./ Lincoln S&L Sec. Lit.*, 794 F. Supp. 1424, 1448-49 (D. Ariz. 1992), Judge Bilby detailed the *allegations* against

Lexecon. Judge Bilby held that a rational finder of fact could find that Lexecon possessed reckless scienter in its performance of certain services on behalf of Charles Keating, Jr., and therefore denied Lexecon's motion for summary judgment. Defendants contend that because the readership of the *National Law Journal* is primarily composed of lawyers and the Roddy letter refers to the order being issued in the context of denial of a motion for summary judgment, readers of the article must have understood that Judge Bilby's order merely stated that sufficient evidence of Lexecon's misconduct existed to preclude summary judgment. The Roddy letter, however, does not accurately report what Judge Bilby's order stated. The letter attempts to enhance Milberg Weiss' allegations by recasting those allegations as the conclusions reached by Judge Bilby. Plaintiffs contend that Roddy's statement was defamatory per se. Illinois law recognizes two kinds of defamation: defamation per se and defamation per quod. *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 221, 607 N.E.2d 201 (1992). Defamation per se encompasses those statements whose defamatory character is apparent on its face; defamation per quod categorizes those statements which require extrinsic facts in order to explain their defamatory meaning. *Id.*, 607 N.E.2d at 206.

There are four categories of statements under Illinois law that are considered defamatory per se: (1) words which impute the commission of a criminal offense; (2) words that impute infection with a loathsome communicable disease; (3) words that impute an inability to perform or want of integrity in the discharge of duties of office or employment; or (4) words that prejudice a party, or impute lack of ability in his or her trade, profession or business. *Id.* Roddy's letter's reference to Judge Bilby's order is within categories (3) and (4).

Nevertheless, even if a statement falls into one of the four per se categories, it will not be found to be defamatory per se if it is reasonably capable of an innocent construction. *Id.* Milberg Weiss argues that Illinois' innocent construction rule applies to this statement. This rule requires the Court to consider the statement in context, giving the words their ordinary meaning. If the statement may reasonably be innocently construed, it will not be regarded as defamatory per se. *Id.* Milberg Weiss contends that Roddy's letter is capable of being innocently construed, relying upon *Owen v. Carr.*, 113 Ill. 2d 372, 497 N.E. 1145 (1986).

Milberg Weiss' reliance on *Owen* is misplaced. In that case, the Illinois Supreme Court examined another *National Law Journal* article in its entirety and concluded that the defendant attorney's comments were capable of being construed as "an attorney's biased presentation of his client's view of a pending cause of action." *Id.*, 497 N.E.2d at 1148. In contrast, Roddy depicted his letter as a factual recitation. His letter stated:

> For those readers who are interested in *facts*, however, let me point out the following:
>
> . . . .
>
> Lexecon's motion for summary judgment also was denied by Judge Richard M. Bilby, in a published opinion that details its wrongful activities on behalf of convicted felon Charles H. Keating, Jr.'s American Continental Corp. and Lincoln Savings & Loan in fraudulent dealings with federal regulators. *In re American Continental Corp./Lincoln Savings & Loan Securities Litigation*, 794 F.Supp. 1424, 1443-49 (D. Ariz. 1992).

(Emphasis in original). Nor, contrary to defense counsel's suggestion, does Roddy's citation to Judge Bilby's opinion significantly mitigate the inaccurate nature of his statement. If anything, inclusion of the citation was likely to be viewed by readers as authoritative proof that the proceedings unfolded as Roddy described.

Milberg Weiss also suggests that Roddy's letter falls within the "self defense" privilege of Illinois common law. *See, e.g.*, Restatement (Second) of Torts § 594, comment e. However, as the initial article was neither defamatory nor solicited by Lexecon, this privilege does not attach.

Defendants' last argument is that Roddy's summary of Judge Bilby's order is privileged because it was a fair abridgement of judicial proceedings. But, as the Court has already found, Roddy's letter was not an accurate summary. Accordingly, this privilege also does not apply.

Milberg Weiss defendants also seek summary judgment as to the remaining two statements in the Roddy letter. These statements concern the assertion that Lexecon entered a "settlement" and "to date, Lexecon has paid . . . more than $700,000 . . . ."

Plaintiffs contend that the letter falsely stated that "Lexecon settled with plaintiffs." Dismissal of the class's claims against Lexecon occurred following negotiations between Lexecon counsel and counsel for the class. The dismissal was termed a "resolution" rather than a settlement. The resolution required Lexecon to provide substantial services. Roddy's characterization of the resolution as a settlement was not false.[8]

The resolution obligated Lexecon to perform certain services. Lexecon did not perform these services; rather, owing to a dispute with class counsel, it paid to the class an amount equal to the professional fees it earned from Keating. This amount exceeded $700,000. Accordingly, the Roddy letter was also not false in its suggestion that

[8] The Court has previously ruled that Judge Bilby's December 31, 1992 order would be given preclusive effect. In that order, Judge Bilby held that the resolution which effected Lexecon's dismissal was a bargained-for exchange, with consideration flowing both ways.

in settling with the class, Lexecon "to date" had "paid . . . more than $700,000." [9]

Milberg Weiss defendants' motion for summary judgment is denied as to the Roddy letter's summary of Judge Bilby's published opinion and is granted in all other respects.

Tortious Interference and Commercial Disparagement Claims

The previous Order dismissed all remaining defamation claims. However, the conduct that was the basis for those dismissed claims is also the conduct upon which plaintiffs base their tortious interference and commercial disparagement claims.

Facts

The acts that form the basis of plaintiffs' tortious interference and commercial disparagement claims are as follows:

(1) The statment of Milberg Weiss attorney Patrick Coughlin, which appeared in the March 15, 1991 issue of *The Recorder*, a San Francisco-area legal newspaper, that Fischel made the "biggest mistake any guy made in the country";

(2) Milberg Weiss attorney William Lerach's statement at a securities litigation seminar in northern California on July 23, 1991, that Fischel gave Charles Keating, Jr. a "clean bill of health";

(3) Milberg Weiss attorney Patricia Hynes' statement to opposing counsel on a recess after a hearing in district court in Chicago that Lexecon carried "too much baggage" to be an effective expert witness for opposing counsel;

[9] While no one expected Lexecon to pay additional money, Roddy's reference "to date" was at most an inartful way of stating that Lexecon had met its obligations under the terms of the resolution.

(4) Statements concerning Lexecon made by Milberg Weiss attorneys in briefs and in Court during the *Apple Computer* litigation, including Coughlin's statement in court that "we actually think [Fischel's] a crook;"

(5) Statements made by Milberg Weiss attorneys during the *Lincoln Savings* litigation, including the contents of the proposed Fifth Amended Complaint in which Lexecon and Fischel were named as defendants, which prompted Arthur Young to terminate its relationship with Lexecon;

(6) Milberg Weiss attorney Leonard Simon's statement to Sidney Davidson after Judge Bilby denied the motion to file the Fifth Amended Complaint, concerning class counsel's intent to sue Fischel and Lexecon again;

(7) Milberg Weiss' alleged attempt to "extort" testimony from Lexecon in exchange for dismissal from the *Lincoln Savings* litigation;

(8) Milberg Weiss attorney Kevin Roddy's statement to an FDIC lawyer that Lexecon, in *Lincoln Savings*, blamed the government for the collapse of that savings and loan; and,

(9) Dissemination of the proposed Sixth Amended Complaint on December 14, 1990.[10]

Discussion

Illinois law recognizes a litigation privilege which accords litigants an absolute privilege with respect to certain communications. *Zanders v. Jones*, 680 F. Supp. 1236 (N.D. Ill. 1988); *Skopp v. First Federal Savings of Wil-*

[10] Plaintiffs also point to other statements made by Milberg Weiss attorneys, including Melvyn Weiss' threat to Fischel to "destroy" him and Eric Isaacson's letter to co-counsel in which he refers to Fischel in derogatory terms. While plaintiffs do not contend that these statements are actionable in themselves, plaintiffs point to them as additional evidence of Milberg Weiss' personal animosity towards plaintiffs.

mette, 189 Ill. App. 3d 440, 545 N.E.2d 356 (1st Dist. 1989); *Libco Corp. v. Adams*, 100 Ill. App. 3d 314, 426 N.E.2d 1130 (1st Dist. 1981). The only qualification to this privilege is that the communication pertain to litigation. *Skopp*, 545 N.E.2d at 361. Under these cases, "anything said or written in the course of a legal proceeding is protected by an absolute privilege." *Zanders*, 680 F. Supp. at 1238. Furthermore, the communication need not occur in court. For instance, in *Zanders*, a telephone conversation between opposing counsel was conceded to fall within the rule, and in *Libco*, a communication between two attorneys suing the same defendant was found to be priveleged. The rationale for the privilege is to secure for attorneys as officers of the court the utmost freedom in representing clients. *Libco*, 426 N.E.2d at 1132 (citing Restatement (Second) of Torts § 586, Comment a). All doubts are to be resolved in favor of finding that the privilege applies. *Skopp*, 545 N.E.2d at 36. Applying this law to the facts presented, statements (3), (4), (5), (6), (7) and (8) are privileged.[11] Accordingly, these statements cannot form the basis for any tort.[12]

Statements (1) and (2) are clearly expressions of opinion. Opinion statements are not actionable as defamation. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990).[13]

[11] Plaintiffs argue that the privilege should be limited to situations in which attorneys are acting as advocates on behalf of their clients, so that "gratuitous" remarks in the course of otherwise protected conversations would be actionable. This position is not supported in Illinois law.

[12] Additionally, statements (6) and (8) are not actionable as tortious interference because they are substantially true. *George A. Fuller Co. v. Chicago College of Osteopathic Medicine*, 719 F.2d 1326, 1332 n.4 (7th Cir. 1983) (citing Restatement (Second) of Torts § 772(a)).

[13] Milberg Weiss asserts that opinion statements are "constitutionally privileged," and that once a privilege attaches to a state-

Opinions are also not actionable as commercial disparagement.[14] Lexecon maintains, however, that opinions may be actionable under a theory of tortious interference, citing *Chaves v. Johnson,* 230 Va. 112, 335 S.E.2d 97 (1985). However, the continuing viability of *Chaves'* holding is highly questionable in light of *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46 (1988). Furthermore, in *Unelko Corp. v. Rooney,* 912 F.2d 1049, 1057-1058 (9th Cir. 1990), the Ninth Circuit stated that claims for tortious interference and commercial disparagement "are subject to the same first amendment requirements that govern actions for defamation." Therefore, under the rationale of *Falwell* and *Unelko,* statements (1) and (2) are not actionable as either tortious interference or commercial disparagement.

In addition, plaintiffs inability to disaggregate damages is fatal to these claims. Plaintiffs' only damages expert, plaintiff Daniel Fischel himself, has testified at his deposition that he is unable to apportion plaintiffs' losses among the several acts which are claimed to be tortious. The Ninth Circuit has held that summary judgment is proper when a plaintiff has not or cannot disaggregate damages caused by actionable events from those caused by non-actionable events. *City of Vernon v. Southern Cal. Edison Co.,* 955 F.2d 1361, 1372-73 (9th Cir. 1992).

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ment, it is not actionable under any tort theory. *Genelco, Inc. v. Bowers,* 181 Ill. App. 3d 1, 536 N.E.2d 783 (1st Dist. 1989). However, the Supreme Court has explicitly held that opinions are not constitutionally privileged. *Milkovich,* 497 U.S. at 21. The reason opinions are not actionable as defamation is that it is impossible to prove their falsity, a necessary element of defamation. *Id.* 497 U.S. at 20.

[illegible] Illinois statutory definition of commercial disparagement protects against "false or misleading misrepresentation[s] of *fact.*" 815 ILCS § 510/2(8) (emphasis added). Illinois common law commercial disparagement requires a plaintiff to show a *false* and demeaning statement regarding the quality of another's goods or services. *Appraisers Coalition v. Appraisal Institute,* 845 F. Supp. 592, 610 (N.D. Ill. 1994).

Fischel, during his deposition testimony, was unable to disaggregate damages attributable to defendants' various acts. The time for discovery has elapsed. Since plaintiffs cannot separate the damages resulting from statements (1) and (2) from damages resulting from the other statements which the Court has found to be privileged, plaintiffs may not recover any damages for them.

Finally, plaintiffs maintain that Roddy's dissemination of the proposed Sixth Amended Complaint could be the basis for an action under either a tortious interference or commercial disparagement theory. For the reasons previously set forth relating to Illinois' litigation privilege and plaintiffs' inability to disaggregate damages, the complaint cannot be the basis for these claims.

Defendant's Counterclaims

Plaintiffs have filed a motion to dismiss the Milberg Weiss defendants' counterclaims. These counterclaims consist of three contract-related counts, those being breach of contract, unjust enrichment, and promissory estoppel, and one count of fraud.

Milberg Weiss was class counsel in the *Lincoln Savings* securities litigation. The counterclaims are based upon assertions that Lexecon misled Milberg Weiss into accepting the "resolution," resulting in the dismissal of Lexecon. It is undisputed that Lexecon counsel stated that plaintiffs wanted the dismissal to be labelled a resolution in order to prevent future damaging cross-examination of Fischel concerning a settlement of the *Lincoln Savings* case. However, Milberg Weiss maintains Fischel also wanted the case termination to be labelled a resolution so that he would preserve the option of suing class counsel. Milberg Weiss argues that Lexecon was under a duty to disclose this second motive to them.[15]

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[15] Plaintiffs' lawsuit against Milberg Weiss cannot be said to be entirely unexpected in light of Lexecon's counsel's inquiry of class

Milberg Weiss defendants also argue that Lexecon misrepresented the existence of insurance coverage. This ground, however, is not alleged in the counterclaims.[16]

The counterclaims must be dismissed. All of the counterclaims assume that class counsel was a *party* to the resolution. The law is otherwise. Lawyers are agents of clients. *Barmat v. John and Jane Doe Partners A-D*, 155 Ariz. 515, 517, 747 P.2d 1214, 1216 (App. 1986) (citing Restatement (Second) of Agency § 1, comment e), *aff'd in relevant part*, 155 Ariz. 519, 747 P.2d 1218 (1986). An agent is not a party to a contract. Restatement (Second) of Agency § 320, comment b. Whatever harm resulting from the resolution was sustained by the class, not by class counsel. Therefore, defendants lack standing to pursue these claims. Plaintiffs' motion to dismiss the counterclaims is well taken.

Conclusion

For the foregoing reasons, IT IS HEREBY ORDERED that Milberg Weiss defendants' motions for summary judgment as to the defamation claim based upon dissemination of the Sixth Amended Complaint, the tortious interference claims, and the commercial disparagement claims ARE GRANTED.

IT IS FURTHER ORDERED that Milberg Weiss defendants' motion for summary judgment as to the Kevin

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counsel, during negotiations of the "resolution," as to whether it would be necessary for Lexecon to give up any right Lexecon might have to file future lawsuits against class counsel. Class counsel stated that forbearance of any future actions was unnecessary.

[16] Lexecon had insurance proceeds in the amount of approximately $2 million at the time the resolution was entered, which reflected a favorable settlement Lexecon achieved with its insurance carrier to partially reimburse its litigation expenses. Lexecon counsel had previously indicated that no insurance existed. Lexecon maintains that it's insurance policies were produced and deposited in MDL 834 document depository and so were available for inspection by defendants.

Roddy letter to the *National Law Journal* IS GRANTED IN PART AND DENIED IN PART.

IT IS FURTHER ORDERED that the Cotchett, Illston and Pitre defendants' motion for summary judgment IS GRANTED.

IT IS FURTHER ORDERED that plaintiffs' motion to dismiss defendants' counterclaims IS GRANTED.

By separate Order, the Court will address the venue issue.

Dated this 20th day of April, 1995.

/s/ John M. Roll
JOHN M. ROLL
United States District Judge

APPENDIX F

[Filed Nov. 29, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MDL Docket No. 834
No. CIV 93-1087 PHX JMR

IN RE AMERICAN CONTINENTAL CORPORATION/LINCOLN SAVINGS & LOAN SECURITIES LITIGATION.

LEXECON INC. and DANIEL R. FISCHEL,
Plaintiffs,

v.

MILBERG WEISS BERSHAD HYNES & LERACH, a partnership; COTCHETT, ILLSTON & PITRE, a partnership; GREENFIELD & CHIMICLES, a partnership; and PATRICK COUGHLIN, BLAKE HARPER, WILLIAM S. LERACH, KEVIN P. RODDY, LEONARD SIMON, MELVYN I. WEISS, JARED SPECTHRIE, PATRICIA HYNES, MICHAEL C. SPENCER, STEPHEN STEINBERG, JOSEPH COTCHETT, and SUSAN ILLSTON, individually,
Defendants.

ORDER

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Lexecon is an economic consulting firm, some of whose employees, including Plaintiff Daniel Fischel, testify frequently as experts on certain economic issues.

Fischel is a tenured professor at the University of Chicago Law School.[1] Defendants Milberg Weiss Bershad Hynes & Lerach, Cotchett, Illston & Pitre, and Greenfield & Chimicles are law firms that specialize in securities class action litigation.[2] As such, they were co-counsel for class plaintiffs, in *Shields v. Keating, et al,* MDL No. 834, a multi-district case litigated in the district of Arizona.

Shields was a class action brought on behalf of purchasers of securities issued by Keating's company, American Continental Corporation ("ACC" or "ACC/Lincoln"). The class sought over $360 million in pretrebled damages and unspecified punitive damages against a variety of defendants claiming that they had conspired to violate securities and racketeering laws by misleading investors with respect to the safety of ACC securities. In September 1989, the accounting firm of Arthur Young & Co., one of the *Shields* defendants, retained Lexecon and Fischel as experts to assist in preparing its defense.[3]

In March 1990, defendants (as class counsel) sought leave to file a fifth amended complaint in order to add both Lexecon and Fischel as parties. Defendants based the class claim against Lexecon and Fischel on certain reports prepared by that organization on behalf of ACC/Lincoln for submission to federal regulators. The pro-

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[1] Plaintiffs will be referred to in the singular as "Lexecon" throughout the text.

[2] Defendants break into several distinct groups. In addition to the firm, the Milberg Weiss defendants refers to active partners Patrick Coughlin, Blake Harper, William S. Lerach, Kevin P. Roddy, Leonard B. Simon, Melvyn I. Weiss, Patricia Hynes, Michael S. Spencer and former partners Stephen Steinberg and Jared Specthrie. The Cotchett, Illston & Pitre defendants include the firm and its partners Joseph Cotchett and Susan Illston. The Greenfield & Chimicles defendant refers exclusively to the firm.

[3] Prior to the attempted amendment, Lexecon had been retained by *Shields* defendant Arthur Young & Co. as an expert. Lexecon's services were thereafter terminated.

posed Fifth Amended Complaint alleged that Lexecon and Fischel had learned the "true" nature of ACC/Lincoln's business practices, but nevertheless assisted the thrift in its efforts to keep regulators at bay while it continued to sell worthless debentures. The motion for leave to file an amended complaint was denied in May of 1990.

Approximately six months after this ruling, defendants renewed their efforts to bring Lexecon into the *Shields* litigation. Defendants created a purported "Sixth Amended Complaint" naming Lexecon and Fischel as defendants. This document was circulated to dozens of Lexecon's potential clients—individual lawyers, law firms, and corporations—not all of whom were prospective parties to the complaint.[4] This pleading was never filed. A few days later, however, a different version of the proposed "Sixth Amended Complaint" was filed, this time deleting Fischel as a named defendant.[5] On January 30, 1991, leave to file was granted.

According to Lexecon, defendants' purpose behind involving Lexecon and Fischel in the *Shields* litigation was threefold: (1) to extract false testimony implicating other *Shields* defendants, (2) prevent Arthur Young & Co. from using Lexecon as an expert in *Shields*, and (3) "to make Lexecon in general and Fischel in particular far less attractive to potential clients as expert witnesses." Lexecon claims that defendants were making good on Melvyn Weiss's threat to "destroy" Fischel because of his testimony widely believed to have produced several big victories against clients represented by Milberg Weiss.

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[4] At oral argument, counsel for Milberg Weiss defended this action my stating that the complaint was only distributed to the service list and "the world is my service list . . . . [t]hey are all potential clients of Jenner, Block and Solovy, but the service list is the service list . . . ."

[5] Fischel does appear in the body of the complaint and is referred to as a defendant.

The *Shields* case went to trial in the summer of 1992. After all of the evidence was in following a four-month trial but before closing arguments, in what was termed a "resolution," Lexecon was dismissed from the case.[6] As part of the resolution, *Shields* defendant Touche Ross agreed to settle with the class for $7.5 million and to perform certain claims administration services. The claims services would be subcontracted to Lexecon. In exchange, the court would enter a voluntary dismissal without prejudice as to Lexecon. The parties agreed to execute a dismissal with prejudice to be held by the trial judge, the Honorable Richard M. Bilby, and made part of the record in the event it became necessary to show that all claims against Lexecon were barred.

After extended negotiations facilitated by Judge Bilby, the parties carefully crafted the resolution in such a way as to specifically avoid the appearance of settlement. Lexecon's counsel stated on the record that Lexecon decided to provide a benefit to the class because it was persuaded that its services may have been misused by ACC/Lincoln, but qualified its position by noting that Lexecon could not agree to provide its services as a quid pro quo for dismissal because settling would subject its experts to unfair cross-examination with respect to credibility and expertise.

The resolution fell apart shortly after having been entered into. Class counsel explained to Judge Bilby that they were concerned in retrospect that Lexecon was unable to perform the work. At this point, Lexecon had spent $123,000 for the first portion of the claims services. Class counsel suggested instead that a third party be retained at Lexecon's expense. Fischel responded by issuing a check to the class for $593,960, which, combined with the monies previously spent, represented the total

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[6] Lexecon's motions for summary judgment and directed verdict were denied.

amount Lexecon had earned from its work with ACC/Lincoln. In a letter accompanying the payment, Fischel stated that Lexecon had been improperly prevented from performing services for the class and that it had decided to benefit the class instead by returning its professional fees.

In November of 1992, Lexecon filed a complaint in the Northern District of Illinois alleging malicious prosecution, abuse of process, defamation, and other commercial disparagement torts. It is Lexecon's position that it had no choice but to sue due to defendants' improper collateral use of Lexecon's involvement in *Shields*. The case was thereafter referred to the multi-district litigation panel which determined that the matter was properly considered a part of the *American Continental Corporation/Lincoln Savings and Loan Litigation*. The case is now pending before this Court.

MOTIONS TO DISMISS

Defendants, upon individual and joint motion, seek dismissal of the amended complaint for failure to state a claim upon which relief can be granted. A complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) when, accepting all well-pleaded allegations of fact as true, and drawing all reasonable inferences in favor of the plaintiff, no relief could be granted under any set of facts that might be proved. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). "Where a claim involves the right to petition governmental bodies . . . we apply a heightened pleading standard." *Oregon Natural Resources Council v. Mohla*, 944 F.2d 531, 533 (9th Cir. 1991).

I.

MALICIOUS PROSECUTION

A. *Choice of Law.*

Count One of the Amended Complaint asserts a claim of malicious prosecution under Arizona law. Defendants argue that Illinois law governs the disposition of all counts of the amended complaint, including the malicious prosecution claim. A transferee court must follow the choice of law rules of the transferror court. *Ferens v. John Deere Co.*, 494 U.S. 516 (1990) (rule announced in context of a § 1404(a) transfer for "the convenience of parties and witnesses"). As a federal court exercising its diversity jurisdiction, the Illinois district court would have applied the substantive law of Illinois, including the Illinois choice of law rules. *Goldberg v. Medtronic, Inc.*, 686 F.2d 1219, 1225 (7th Cir. 1982). Illinois has adopted a "most significant relationship" test for determining the substantive law applicable in tort cases. *Ingersoll v. Klein*, 262 N.E.2d 593 (Ill. 1970).

In deciding which state has the most significant contacts, courts look to (1) the domicile of the parties; (2) the place where the injury occurred; (3) the place where the conduct causing the injury occurred; and (4) the place where the relationship, if any, between the parties is centered. *Miller v. Long-Airdox Co.*, 914 F.2d 976, 978 (7th Cir. 1990). "Illinois law presumes that the law of the state where the injury occurred will govern unless another state has a more significant relationship to the occurrence or to the parties involved." *Id.* (internal citations omitted). *See also Restatement (Second) of Conflicts of Laws* § 155 (1971) ("The rights and liabilities of the parties for malicious prosecution or abuse of process are determined by the local law of the state where the proceeding complained of occurred, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 . . . .").

To defeat the general presumption that Arizona has the greater interest, defendants claim that none of the parties is a citizen of Arizona,[7] the alleged injuries occurred in Illinois, and the parties' relationship is centered in Illinois. This is insufficient rebuttal, however. All defendants have really shown is that the parties have engaged in a nationwide practice and their contacts are vast. They have not shown that between Arizona and Illinois, Illinois has a greater interest in the outcome of this case. Because the *Shields* case was prosecuted in Arizona and particularly because the complaint against Lexecon was filed here, the malicious prosecution and abuse of process counts are governed by Arizona state law. *See Engel v. CBS Inc.*, 981 F.2d 1076 (9th Cir. 1992) (New York state's interests would be impaired if litigants practicing in New York federal court were not subject to New York's restrictive policy with respect to malicious prosecution actions).

B. *Elements of the Tort.*

To sustain a claim for malicious prosecution, the "[p]laintiff must prove defendant (1) instituted a civil action which was (2) motivated by malice, (3) begun without probable cause, (4) terminated in plaintiff's favor and (5) damaged plaintiff." *Bradshaw v. State Farm Mutual Auto Ins. Co.*, 157 Ariz. 411, 417, 758 P.2d 1313, 1319 (1988). Although defendants concede nothing, the only prongs seriously in contention are numbers three and four.[8]

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[7] The interest of the state where the plaintiff resides is not more significant than the state where the underlying litigation was prosecuted. *R.J.R. Services, Inc. v. Aetna Cas. & Surety Co.*, 895 F.2d 279, 282 n. 4 (7th Cir. 1989).

[8] Because the Court finds Lexecon has failed to sufficiently plead the probable cause requirement, Count One is deficient as a matter of law and the Court need not reach the favorable termination factor.

Under Arizona law, the test for whether probable cause exists is both subjective [9] and objective. *Id.* "The initiator of the action must honestly *believe* in its possible merits; and, in light of the facts, that *belief must be objectively reasonable.*" *Id.* (emphasis in original).

This formulation is no longer viable under recent Supreme Court authority. In *Professional Real Estate v. Columbia Pictures Industries*, 113 S.Ct. 1920, 1925 (1993), the Supreme Court addressed the issue of whether litigation that is "not significantly motivated by a genuine desire for judicial relief" can be a "sham" and actionable under the antitrust laws. The Court stated that "an objectively reasonable effort to litigate cannot be a sham regardless of subjective intent." *Id.* at 1926. In other words, as long as the underlying lawsuit is not objectively baseless, the plaintiff cannot be held liable for bringing the suit even if the plaintiff's motives were malicious. *Id.*

The *Professional Real Estate* decision is the most recent development in the ongoing evolution of the *Noerr-Pennington* doctrine. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). *Noerr-Pennington* shields efforts to influence legislative or executive action from liability under the antitrust laws, with the exception of those deeds "ostensibly directed toward influencing governmental action . . . [as]

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[9] Lexecon cites three occasions when lawyers from each of the defendant firms acknowledged the absence of merit in the complaint against Lexecon. The Amended Complaint alleges that Joseph Cotchett admitted to Lexecon's former attorney, Stephen C. Neal, that there was no basis for the claims against Lexecon and that the decision to sue was based on Milberg's animus. Further, the Amended Complaint states that Stephen Steinberg, a Milberg Weiss partner, related to Fischel that he believed it "wrong" to bring Lexecon into the suit. Third, a Greenfield & Chimicles partner suggested to Fischel that the lawsuit against Lexecon was the result of a vendetta on Milberg's part.

a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationship of a competitor." *Noerr*, 365 U.S. at 144. The protection has been extended to litigation and includes claims other than those brought under the antitrust laws. *California Motor Transp. v. Trucking Unlimited*, 404 U.S. 508 (1972); *Franchise Realty, Etc. v. S.F. Loc. Joint Executive*, 542 F.2d 1076 (1976), *cert. denied*, 430 U.S. 940 (1977). Indeed, "while the doctrine evolved in the context of anti-trust litigation . . . the doctrine has been applied to protect the First Amendment right to petition against claims of tortious interference with business relations." *Havoco of America, Ltd. v. Hollobow*, 702 F.2d 643, 649 (7th Cir. 1983) (citations omitted).

In *Professional Real Estate*, the Supreme Court articulated a two-part test to determine whether activity otherwise protected under *Noerr-Pennington* loses its immunity under the sham exception:

> First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objecive litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized . . . . Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor through the use of the governmental process—as opposed to the outcome of that process—as an anti-competitive weapon.

Professional Real Estate, 113 S.Ct. at 1922.

Defendants argue that *Professional Real Estate* renders the subjective branch of the *Bradshaw* probable cause test unconstitutional. Lexecon responds by claiming that

Noerr-Pennington is essentially a principle of statutory construction and that *Professional Real Estate* does not constrict the permissible limits of common law torts. The Ninth Circuit in *Oregon Natural Resources* held that when probable cause exists for the filing of the underlying suit, the *Noerr-Pennington* doctrine bars all types of state law claims challenging that suit, specifically referring to abuse of process and tortious interference claims. *Oregon Natural Resources Counsel v. Mohla*, 944 F.2d 531, 532-34 (9th Cir. 1991). Subjective intent is only relevant if the objective prong is satisfied.

To survive the motion to dismiss, therefore, Lexecon must show that the *Shields* litigation was objectively baseless and this it cannot do. Although the Court does not find as defendants would have it that the related doctrines of law of the case and collateral estoppel ordain this result, the Court has independently concluded that no reasonable person could find that the Sixth Amended Complaint lacked objective probable cause.[10] The record before this Court as recited in the *Shields* rulings is highly persuasive evidence that the case against Lexecon meets the probable cause threshold.

II.

ABUSE OF PROCESS

Liability for abuse of process occurs when "[o]ne . . . uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed . . . ." *Restatement (Second) of Torts*

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[10] *See Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1198 (9th Cir. 1988) (court considering a Rule 12(b)(6) motion properly may look beyond the complaint to items in the record of the case, or to matters of general public record); *Mack v. South Bay Beer Distrib., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986) (a motion to dismiss was not converted to a motion for summary judgment when court looked beyond the pleadings to matters of public record).

§ 682 (1977). "The essential elements of the tort include a wilful act in the use of judicial process for an ulterior purpose not proper in the regular conduct of the proceedings." *Morn v. City of Phoenix*, 152 Ariz. 164, 166, 730 P.2d 873, 875 (App. 1986). "Abuse of process . . . is not commencing an action or causing process to issue without justification," *Prosser & Keeton On Torts* § 121 at 897 (5th ed. 1984), but requires an overt act other than the initiation of a lawsuit to effect the illegitimate end. *Joseph v. Markovitz*, 27 Ariz. App. 122, 551 P.2d 873 (App. 1976). "It is the subsequent misuse which constitutes the misconduct for which liability is imposed." *Nienstedt v. Wetzel*, 133 Ariz. 348, 353, 651 P.2d 876 (App. 1982). Without more, an abuse of process claim will not lie even when process was issued without justification. *Morn*, 152 Ariz. at 167, 730 P.2d at 874.

Defendants first argue that Lexecon's abuse of process claim is duplicative of the malicious prosecution count. Although closely related to malicious prosecution, the tort of abuse of process serves to protect different interests.[11] As the leading authority explains:

> The action for malicious prosecution, whether it be permitted for criminal or civil proceedings, has failed to provide a remedy for a group of cases in which legal procedure has been set in motion in proper form, with probable cause, and even with ultimate success, but nevertheless has been perverted to accomplish an ulterior purpose for which it was not designed. In such cases, a tort action has been developed for what is called abuse of process.

Prosser and Keeton, § 121 at 897. Notwithstanding the different purposes served by the two torts, defendants are correct that something more than filing the complaint is required for Lexecon to make a prima facie showing.

[11] Assuring continued access to the courts is an important consideration limiting *liability*. 1 F.V. Harper, F.J. James & O.S. Grey, *The Law of Torts*, § 4.9 (2d ed. 1985).

Lexecon's additional allegations involve defendants' purported request for Lexecon to implicate others involved with American Continental and the subsequent collateral use of the *Shields* complaint for impeachment purposes in unrelated litigation. First, pre-process activities do not satisfy the pleading requirement.[12] The "threat of suit cannot constitute a 'wilful act' for the tort," *Blue Goose Growers, Inc. v. Yuma Groves, Inc.*, 641 F.2d 695, 697 (9th Cir. 1981), because "an actual use of the suit" is required. *Joseph*, 27 Ariz. App. at 126. Lexecon does not dispute this general principle only its application here asserting that defendant's wilful acts occurred after process was invoked.

Under Arizona law, the term process "has been interpreted broadly, and encompasses the entire range of procedures incident to the litigation process." *Nienstedt*, 133 Ariz. at 352, 651 P.2d at 880 (abuse of process principles apply to case where ulterior purpose was to expose injured party to attorneys' fees and costs). The *Nienstedt* court enumerated the following as examples of process: "the noticing of depositions, the entry of defaults, and the utilization of various motions such as motions to compel production, for protective orders, for change of judge, for sanctions and for continuances." *Nienstedt*, 133 Ariz. at 352-53, 651 P.2d at 880-81. Even under *Nienstedt*'s liberal definition, however, the filing of the motion for leave to file the Fifth Amended Complaint does not constitute process. The motion was denied and summons did not issue.

Lexecon additionally claims that post-process misconduct occurred through defendants' collateral use of the *Shield*'s complaint for impeachment purposes in other

[12] Class plaintiff's "Motion to File Fifth Amended Complaint" was filed with the court in March of 1990. Defendants' alleged extortion attempt whereby they would withdraw the complaint in exchange for damaging testimony by Lexecon against other *Shields* defendants occurred the following month.

litigation.[13] *Prosser & Keeton* equates special advantage with extortion. *Prosser & Keeton*, § 121 at 898. Defendants' actions in this regard do not constitute the impermissible "special advantage" necessary to support the tort. Accordingly, Count Two must also be dismissed.

III.

INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

Illinois common law tortious interference with prospective economic advantage requires: (1) a reasonable expectation on the plaintiff's part of entering into a valid business relationship; (2) purposeful interference and defeat of plaintiff's legitimate expectancy by defendant; and (3) damage. *Philip I. Mappa Interests Ltd. v. Kendle*, 544 N.E.2d 1008, 1011 (Ill. App. 1990). In those cases in which the defendant acted with a qualified privilege or justification, the plaintiff bears the additional burden of pleading actual malice. *Id.* "Bare allegations of actual malice, unsupported by facts, are not sufficient to negate the protections of privilege or justified conduct." *Id.* It is critical to note, however, that the claim must be based on more than the alleged wrongful filing of a lawsuit. *Havoco*, 702 F.2d at 647.

The well-pleaded facts in support of Count Three are as follows. Defendants' interference with Lexecon's expectations began with the publication of the purported Sixth Amended Complaint to Lexecon's clients and prospective clients. Defendants made other public and private statements at a press conference and at a seminar impugning Lexicon's ability and integrity. Defendants discouraged their colleagues from retaining Lexecon and interfered with

[13] In an order dated December 31, 1992, Judge Bilby held that the allegedly improper cross-examination of Lexecon experts was "in accordance with the agreement reached with Lexecon in MDL 834 in every respect."

Lexecon's business arrangements with Professor Sidney Davidson. Malice, Lexecon claims, is present through its allegations that defendants jointly and severally conspired to destroy Lexecon and Fischel.

Defendants again rely upon the *Noerr-Pennington* doctrine and allege that they are immune from liability. However, the predicate acts for liability for this count are not based on the filing of the *Shields* lawsuit but upon the dissemination of the purported Sixth Amended Complaint that was never filed and substantively redacted prior to actual filing. The Court does not even reach the *Noerr-Pennington* analysis on these facts.

Count Three properly states a claim for relief and will not be dismissed.

IV.

DEFAMATION

Count Four of Lexecon's amended complaint alleges a cause of action for defamation and libel. Lexecon describes five specific circumstances when defendants made false and defamatory statements: (1) circulation of the proposed Sixth Amended Complaint, (2) statements made by defendant Patrick Coughlin of Milberg Weiss to the press that plaintiff Fischel had made the "biggest mistake any guy made in the country" in supposedly reaching the conclusion that Lincoln Savings was safe,[14] (3) statements by defendant Lerach of Milberg Weiss at a seminar maintaining that Fischel had given Charles Keating a "clean bill of health," (4) continuing statements made to Lexecon's prospective clients that Lexecon "carried too much baggage to be effective expert

[14] In the reports prepared at the behest of ACC/Lincoln Savings, Lexecon opined that "Lincoln is sound" and is "safer" than other comparable thrift institutions. *In re American Continental Corp./Lincoln S & L Sec. Litig.*, 794 F. Supp. 1424, 1448 (D. Ariz. 1992).

witnesses," (5) a letter authored by defendant Kevin Roddy of December 14, 1992 to the *National Law Journal* stating that Lexecon "settled" the *Shields* case and had paid $700,000 "to date." The letter further stated that Lexecon was guilty of "wrongful activities on behalf of" a convicted felon and "fraudulent dealings with regulators" and suggested that Judge Bilby found Lexecon guilty of the allegations.

To make out a claim for defamation, the plaintiff must set forth sufficient facts to show that the defendant made a false statement concerning plaintiff, that there was an unprivileged publication to a third party with fault by the defendant, and that the publication caused damage to the plaintiff. *Krasinski v. United Parcel Service, Inc.*, 530 N.E.2d 468, 471 (Ill. 1988); *Restatement (Second) of Torts* § 558 (1977). A statement is considered to be defamatory if it "tends to cause such harm to the reputation of another that it lowers that person in the eyes of the community or deters third persons from associating with [that person]." *Homerin v. Mid-Illinois Newspapers*, 614 N.E.2d 496, 497 (Ill. App. 1993).

Lexecon claims that defendants' statements are defamatory per se. Defamation per se occurs when the defamatory character is apparent on the face of the statements, and includes those "words that prejudice a party, or impute lack of ability in [that person's] trade, profession or business." *Kolegas v. Heftel Broadcasting Corp.*, 607 N.E.2d 201, 206 (Ill. 1992). Per se statements are so obvious and materially harmful to the plaintiff that injury to the plaintiff's reputation may be presumed. *Id.*

The Court finds that the only allegations which can survive defendant's motions to dismiss are those based upon the distribution of the proposed Sixth Amended Complaint and the Roddy letter. The other predicate

acts are not factual assertions and, for the following reasons, are entitled to constitutional protection.[15]

The Supreme Court has held that statements that do not contain factual assertions are protected under the First Amendment and may not be the basis of a defamation action. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990). The test to determine whether a defamatory statement is constitutionally protected is a restrictive one; only those statements that "cannot 'reasonably [be] interpreted as stating actual facts' " are entitled to protection. *Id.* at 20 (quoting *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988)). Defendants describe their statements as "no more than a lawyer's 'expression of [his] opinion regarding his client's allegations against' Lexecon, as anyone reading or hearing the statements would have understood." The Court agrees.

V.

COMMERCIAL DISPARAGEMENT

Defendants strongly contend that the Illinois common law cause of action for commercial disparagement has been preempted in its entirety by the enactment of the

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[15] The Court rejects defendants argument that their statements made in reference to Lexecon are absolutely shielded as comments made in the course of a judicial proceeding. *Skopp v. First Fed. Savings*, 545 N.E.2d 356, 360 (Ill. App. 1989) ("An absolute privilege protects anything said or written in a legal proceeding" as long as the "communication pertains to the litigation."). The privilege is not as broad as defendants maintain. For instance, the communication must be "pertinent and material" and be aimed at individuals with a direct connection to the proceedings. *See Kleier Advertising, Inc. v. Premier Pontiac, Inc.*, 921 F.2d 1036, 1043 (10th Cir. 1990). Statements made to the media have been rejected as covered by the privilege. *See Green Acres Trust v. London*, 141 Ariz. 609, 688 P.2d 617, 622-23 (1984). In an analogous matter, the Supreme Court recently ruled that a prosecuting attorney's allegedly false statements made during a press conference were entitled to only qualified immunity from section 1983 liability. *Buckley v. Fitzsimmons*, 113 S.Ct. 2606, 2618 (1993).

state Deceptive Trade Practices Act.[16] *National Educational Advertising v. Cass Student Advertising, Inc.*, 454 F. Supp. 71, 73 (N.D. Ill. 1977). The Act prohibits "false or misleading misrepresentation[s] of fact disparage the goods, services or business of another." 815 ILCS § 510/2(8); *Maytag Co. v. Meadows Mfg. Co.*, 35 F.2d 403 (7th Cir. 1929) (disparagement by competitors subject to injunction), *cert. denied*, 281 U.S. 737 (1930). The Act does not, in fact, preempt the common law tort; rather, its intent is to supplement the available remedies. *See* 815 ILCS § 510/3 ("The relief provided in this Section is in addition to remedies otherwise available against the same conduct under the common law."). In discussing the Act, one court noted that it was not intended to be a consumer protection statute, but, rather, was meant to prohibit unfair competition. As such, the Act does not provide a cause of action for damages, but does authorize a private suit for injunctive relief. *Disc Jockey Referral Network, Ltd. v. Ameritech Pub. of Illinois*, 596 N.E.2d 4 (Ill. App.), *appeal denied*, 602 N.E.2d 450 (Ill. 1992).

Although conflicting case law abounds, most courts to consider the issue have concluded that a common law cause of action for *damages* does exist. *See Genelco, Inc. v. Bowers*, 536 N.E.2d 783 (Ill. App.), *appeal denied*, 545 N.E.2d 109 (Ill. 1989); *Crinkley v. Dow Jones & Co.*, 385 N.E.2d 714, 719 (Ill. App. 1978) (strongly suggesting that Illinois recognizes the common law tort despite enactment of Deceptive Trade Practices Act). *But see Magid Mfg. v. U.S.D. Corp.*, 654 F. Supp. 325, 333 (N.D. Ill. 1987) ("In Illinois, however, there is no common law cause of action for commercial disparagement.").

In light of the specific savings clause included in the Illinois statute, Lexecon's position is correct.

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[16] The common law tort of commercial disparagement applies to those statements which demean the quality of one's goods or services.

VI.

COMMERCIAL DISPARAGEMENT UNDER THE ILLINOIS ACT

In Count Six, Lexecon seeks relief pursuant to the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS § 505 *et seq.* The Act prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce. 815 ILCS § 505/2. The Act is to be "liberally construed to effect the purposes thereof." 815 ILCS § 505/11a.

Defendants first claim a First Amendment privilege relying upon the arguments discussed above. *See Skopp v. First Fed. Sav.*, 545 N.E.2d 356, 360 (Ill. App. 1989). Although the privilege may cover the statements made during the collateral litigation, it does not protect defendants from liability created from distribution of the proposed Sixth Amended Complaint.

Second, defendants maintain that Lexecon does not state a claim because it lacks standing to pursue a suit under the Act. Defendants claim that Lexecon is not a "consumer" in that it neither purchased or contracted for goods or services from the defendants nor alleged any effect on competition or consumer protection concerns. Standing, however, is given to all persons. 815 ILCS § 505/10(a). Persons are defined to include partnerships, corporations, companies, and business entities and associations. 815 ILCS § 505/1(c); *Scott v. Cardet International, Inc.*, 321 N.E.2d 386, 392 (Ill. App. 1974) (holding that a 1973 amendment to the Act extended protection to businesspersons). However, "liability under the Consumer Fraud Act [is limited] to conduct that implicates consumer protection concerns." *Hill v. Names & Addresses, Inc.*, 571 N.E.2d 1085, 1101 (Ill. App. 1991).

"[W]here the dispute involves two businesses who are not consumers, the proper test is . . . whether the alleged conduct involves trade practices addressed to the market generally or otherwise implicates consumer protection concerns." *Downers Grove Volkswagen, Inc. v. Wigglesworth Imports, Inc.*, 546 N.E.2d 33, 41 (App. 1989). As a non-consumer business, Lexecon must allege a violation causing at least an indirect consumer effect. *Jays Foods, Inc. v. Frito-Lay, Inc.*, 664 F. Supp. 364, 368-69 (N.D. Ill. 1987).

In support of this court, Lexecon states that "[t]he amended complaint alleges that defendants falsely disparaged plaintiffs' services in order to 'destroy' a formidable and successful adversary in litigation. The resulting loss of business not only injured plaintiffs, but also consumers who were improperly dissuaded from using Lexecon's services." This sufficiently alleges a detrimental effect on Lexecon's ability to compete in the marketplace.

Third, defendants argue that even if Lexecon has standing to sue, the practice of law is immune from a Consumer Fraud Act violation. *Guess v. Brophy*, 517 N.E.2d 693, 696 (Ill. App. 1987), *appeal denied*, 526 N.E.2d 830 (Ill. 1988). This rule prevents the bringing of a malpractice claim pursuant to the statute; it does not, however, protect those engaged in the business of law. *Gadson v. Newman*, 807 F. Supp. 1412 (C.D. Ill. 1992). Accepting Lexecon's pleadings as true as the Court must, Lexecon states a claim pursuant to the Act.

CONCLUSION

IT IS HEREBY ORDERED that Defendants' joint and individual motions to dismiss are GRANTED IN PART and Count One and Count Two of Plaintiffs' Amended Complaint are DISMISSED. Defendants' joint and individual motions to dismiss Count Four are GRANTED IN PART as set forth above. In all other

respects, Defendants' joint and individual motions are DENIED.

Dated November 22, 1993

/s/ John M. Roll
JOHN M. ROLL
United States District Judge

APPENDIX G

June 3, 1993

Docket No. 834

BEFORE THE JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

IN RE AMERICAN CONTINENTAL CORPORATION/LINCOLN SAVINGS AND LOAN SECURITIES LITIGATION

N.D. Illiois, C.A. No. 1:92-CV-7768

LEXECON, INC. *et al.*

v.

MILBERG WEISS BERSHAD SPECTHRIE & LERACH, *et al.*,

Before JOHN F. NANGLE, Chairman, MILTON POLLACK, ROBERT R. MERHIGE, JR., WILLIAM B. ENRIGHT, CLARENCE A. BRIMMER, JR., JOHN F. GRADY, and BAREFOOT SANDERS, Judges of the Panel

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TRANSFER ORDER

Before the Panel is a motion by the Milberg Weiss Bershad Specthrie & Lerach defendants in the above-captioned action (*Lexecon*) to transfer, pursuant to 28 U.S.C. § 1407, *Lexecon* to the District of Arizona for coordinated or consolidated pretrial proceedings with the previously centralized actions in this docket. All *Lexecon* defendants join in the motion. The *Lexecon* plaintiffs oppose transfer.

On the basis of the papers filed and the hearing held, the Panel finds that *Lexecon* shares common questions of fact with previously centralized actions in MDL-834 and that transfer of this action to the District of Arizona will best serve the convenience of the parties and witnesses and

promote the just and efficient conduct of this litigation. Specifically, these actions share questions of fact with an as yet unapproved settlement involving Touche Ross, Lexecon, Inc. and the investor plaintiffs in the Lincoln Savings investor class actions in MDL-834. Centralization under Section 1407 is thus desirable in order to prevent inconsistent pretrial and appellate rulings, avoid duplication of discovery, and conserve the resources of the parties, their counsel and the judiciary.

Although most litigations centralized under Section 1407 are under the supervision of one transferee judge, there have been instances where the Panel has assigned another transferee judge to handle one or more actions in particular litigation. *See Washington Public Utilities Group v. United States District Court*, 843 F.2d 319 (9th Cir. 1987); *Hale v. Firestone Tire & Rubber Co.*, 756 F.2d 1322 (8th Cir. 1985); *In re Department of Energy Stripper Well Exemption Litigation*, 472 F.Supp. 1282 (J.P.M.L. 1979); *In re Sugar Industry Antitrust Litigation*, 395 F.Supp. 1271 (J.P.M.L. 1975), 427 F.Supp. 1018 (J.P.M.L. 1977), MDL-201/201A (J.P.M.L. May 5, 1978) (unpublished order) and 471 F.Supp. 1089 (J.P.M.L. 1979). In light of the presiding MDL-834 transferee judge's recusal in *Lexecon*, we transfer this action for coordinated or consolidated pretrial proceedings with the previously centralized MDL-834 actions to a second transferee judge in the District of Arizona. We note that i) a massive document depository is located in the District of Arizona and ii) the Ninth Circuit has before it an appeal of an order in MDL-834 which may be relevant to the *Lexecon* claims.

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. § 1407, *Lexecon, Inc., et al. v. Milberg Weiss Bershad Specthrie & Lerach, et al.*, N.D. Illinois, C.A. No. 1:92-CV-7768, be, and the same hereby is, transferred to the District of Arizona and, with the consent of that court, assigned to the Honorable John M. Roll for

inclusion in the coordinated or consolidated pretrial proceedings in this docket.

FOR THE PANEL:

/s/ John F. Nangle
JOHN F. NANGLE
Chairman